TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 206.

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

vs.

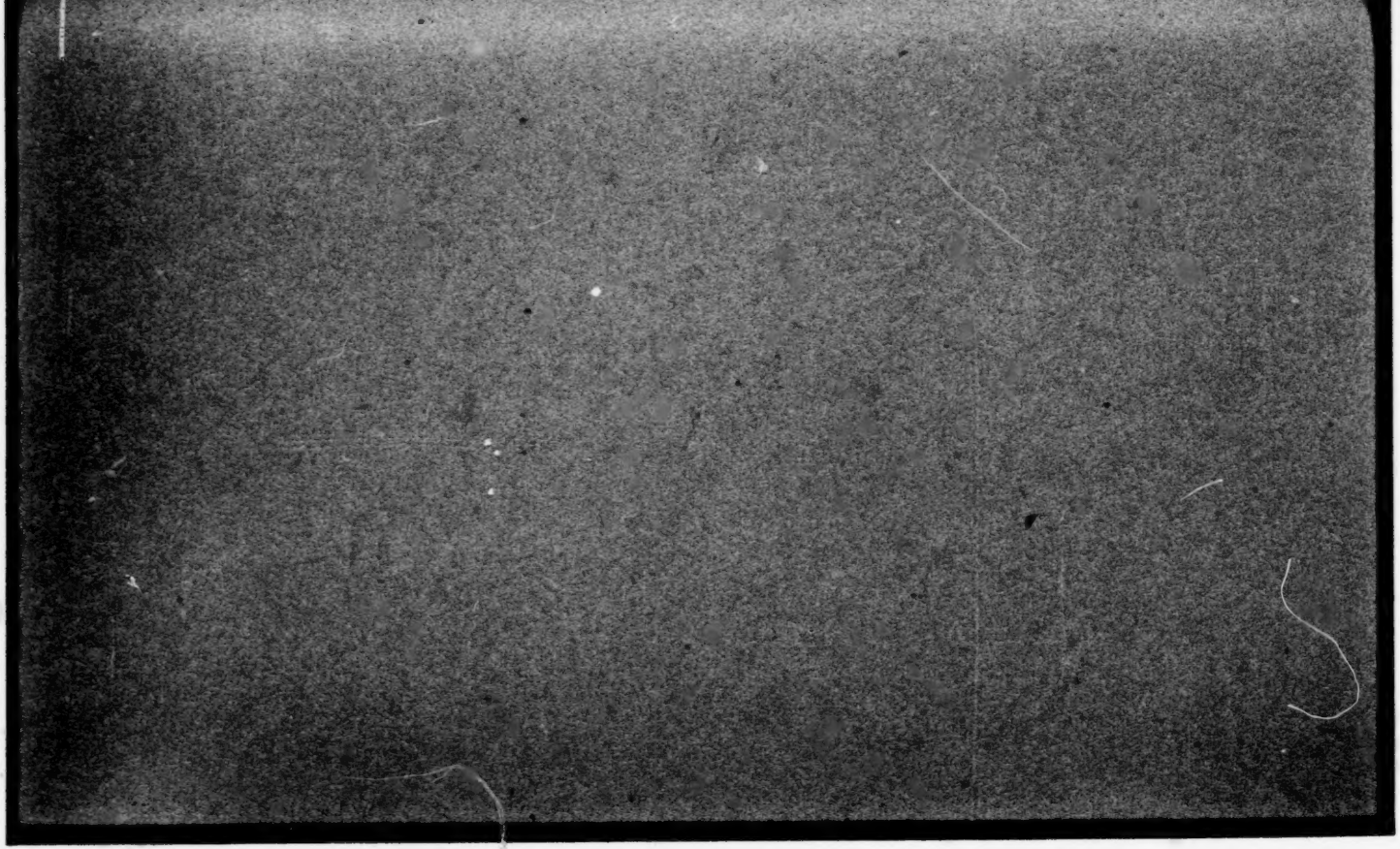
S. B. POSTON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

PETITION FOR CERTIORARI FILED MARCH 31, 1898.

CERTIORARI AND RETURN FILED MAY 23, 1898.

(17,506)



(27,588)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 888.

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

vs.

S. B. POSTON.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 30, 1920.

1 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1919.

S. B. POSTON, Respondent,

vs.

WESTERN UNION TELEGRAPH COMPANY, Appellant.

Appeal from Williamsburg County.

Hon. W. H. Townsend, Judge.

Case.

Willcox & Willcox, Francis R. Stark, Attorneys for Appellant.
Arrowsmith, Muldrow, Bridges & Hicks, Attorneys for Respondent.

Statement.

This action was commenced in the Court of Common Pleas for Williamsburg County, South Carolina, on the 17th day of November, 1918, by the service of the usual summons and the complaint hereinafter mentioned.

2 The purpose of the action was to recover damages alleged to have been sustained by the plaintiff on account of the loss of a sale of two hundred bales of cotton, which loss he alleges was due to delay in delivering certain telegrams mentioned in the complaint.

The answer alleged for a first defense in substance a general denial and a specific denial that the defendant was operating a telegraph line at the time the cause of action accrued; for a second defense, that under the joint resolution of Congress, the Proclamation of the President, and the orders of the postmaster general, the defendant's telegraph line had been taken over by the United States Government and at the time the cause of action accrued, was being operated exclusively by the government; and for a third defense, that there was negligence in the transmission and delivery of the messages, but that the delay, if there was any, was due solely to the prevalence of an epidemic of influenza, which was an act of God.

The case came on for trial before Judge W. H. Townsend and a jury at the spring term, 1919, of the Court of Common Pleas for Florence County and resulted in a verdict in favor of the plaintiff for $1,548.15. Judgment was duly entered on this verdict and within the required time, appellant served notice of its intention to appeal to this court.

As the principal questions raised by the appeal go to the very foundation of the case as made by the complaint and answer, as well as the testimony, it will be necessary to set these out in full, omitting the formal parts.

Complaint.

The plaintiff above named, complaining of the defendant herein, alleges:

I. That at the times hereinafter mentioned defendant
3 Western Union Telegraph Company, was and still is a corporation created and existing under and by virtue of the laws of some State, unknown to plaintiff, owning, maintaining and operating a line of telegraph wires, instruments and offices, among other places at Johnsonville, in the County of Williamsburg, in the State of South Carolina, and in the City of Charleston, in said State, with which instrumentalities it engages in the business of a common carrier of intelligence for hire from and between among other points the places above mentioned, the same being connected by direct wires.

II. That on the second day of October, 1918, the plaintiff, at Johnsonville, S. C., delivered to defendant the following message for immediate transmission and delivery to W. B. Ravenell and Company, Charleston, S. C., to wit:

"W. B. Ravenell & Co., Charleston, S. C.:

"Wire best offer you can get Two Hundred Bales Cotton.

"S. B. POSTON."

III. That said defendant received and accepted said message for immediate transmission and delivery at 12:20 p. m. o'clock on the said second day of October, 1918, and although it maintains a direct wire to the City of Charleston and notwithstanding that the office of the addressee is near the office of the defendant in said city and well within its established free delivery zone, yet still the said message, through the negligence and carelessness of said defendant, its agents, servants and employees, was not delivered to said addressee until 4 p. m. o'clock on said day.

IV. That upon receipt of said message the said W. B. Ravenel & Co. made immediate efforts to secure a sale for the said two hundred bales of cotton referred to in said telegram and at 5:03 p. m. o'clock on said second day of October, 1918, filed with said defendant company, at its offices in Charleston, S. C., for immediate
4 transmission and delivery to plaintiff the following telegram or message, to wit:

"S. B. Poston,
"Johnsonville, S. C.

"Can sell two hundred bales thirty two one half cents, basis middling, landed Charleston, provided, all this year's crop, subject to prompt reply.

"W. B. RAVENEL & CO.

"Charge W. B. Ravenel & Co.—Rush."

V. That said defendant accepted and received the said message as aforesaid at 5:03 p. m. o'clock on the said second day of October, 1918, and although it maintains a direct wire from the City of Charleston to the Town of Johnsonville and notwithstanding that the office of the addressee is within less than two hundred yards from the office of defendant, at Johnsonville, and within its established free delivery zone, and notwithstanding the importance of the said message and the notice afforded by its contents and the written request to "Rush" typewritten upon the same, yet still the said message, by and through the negligence and carelessness of said defendant, its agents, servants and employees, was not delivered to the addressee, the plaintiff herein, until about 1 p. m. o'clock on the Third (3rd) day of October, 1918.

VI. That immediately upon receipt of said message the plaintiff, at Johnsonville, S. C., on the said Third day of October, 1918, at 1:24 p. m. o'clock, delivered to the defendant for immediate transmission and delivery the following reply telegram or message, to wit:

"W. B. Ravenel & Co.,
Charleston, S. C.:

"Your wire. Sell two hundred bales which you have. Balance being shipped today and tomorrow.

"S. B. POSTON."

VII. That said defendant accepted and received said message for immediate transmission and delivery to addressee at 1:24 p. m. o'clock on the said Third day of October, 1918, and although it maintains a direct wire from Johnsonville to the City of Charleston, and notwithstanding that the office of the addressee is near the office of the defendant in said city and well within its established free delivery zone, yet still the said message, through the negligence and carelessness of the defendant, its agents, servants and employees, was not delivered to the address until 4:40 p. m. o'clock on the said Third day of October.

VIII. That during the several delays mentioned and set forth above, in the transmission and delivery of the said telegraph messages, above quoted, the cotton market had declined, the same being matter of which the defendant had notice at and during the time of the aforesaid delays, and, in the absence of the prompt reply upon which **the sale of the aforesaid two hundred bales of cotton had been con-**

gent and careless dereliction on the part of the defendant, with full knowledge of the damage and loss to the plaintiff which would and did result therefrom, the plaintiff lost the sale thereof at 33½ cents per pound.

IX. That during the aforesaid delays due to the causes and arising under the circumstances hereinbefore set forth the cotton market had so declined that plaintiff was forced to sell his cotton, to-wit: the aforesaid two hundred bales, for thirty cents per pound instead of thirty-two and one-half cents per pound, thus and thereby devolving upon plaintiff a loss of Two Thousand Six Hundred and Eighty and 23/100 ($2,680.23) Dollars, which loss and damage was and is due solely and directly to the negligence and carelessness of said defendant in the transmission and delivery of the telegrams hereinbefore set forth.

6 Wherefore, plaintiff prays judgment against said defendant.

First. For the said sum of two thousand six hundred eighty and 23/100 dollars;

Second. For interest on said sum at the rate of seven per cent per annum;

Third. For the costs and expenses of this action and for such other and further relief as may be just and proper.

PHILIP ARROWSMITH,
Attorney for Plaintiff.

November 12th, 1918.

Answer.

The defendant, answering the complaint, herein alleges:

For a First Defense.

1. That it admits so much of Paragraph 1 of the complaint as alleges that it is a corporation and that it owns and maintains a telegraph line between Johnsonville, South Carolina, and Charleston, South Carolina, but it denies that at the times alleged in the complaint it was operating said telegraph line on its own behalf or that it was engaging in its own behalf in the business of a common carrier of intelligence for hire between the said two points.

2. That it admits that a telegram similar to that described in Paragraph 2 of the complaint was filed in its office at Johnsonville, South Carolina, on the date alleged, but it alleges that in so receiving such message for transmission and delivery, it was not acting in its capacity as a common carrier but as an agent for the government of the United States of America.

3. That it denies the allegations of Paragraphs 3, 5, 7, 8 and 9 of said complaint.

7 4. That it admits that a telegram similar to that described in Paragraph 4 of the complaint was filed — it in its office at Charleston, S. C., on the date alleged, but it alleges that in so receiving such message for transmission and delivery, it was not acting in its capacity as a common carrier but as an agent for the Government of the United States of America, and that it denies the remaining allegations of said Paragraph 4 of the complaint.

5. That it admits that a telegram similar to that described in Paragraph 6 of the complaint was filed in its office at Johnsonville, South Carolina, on the date alleged, but it alleges that in so receiving such message for transmission and delivery, it was not acting in its capacity as a common carrier but as an agent for the Government of the United States of America.

For a Second Defense.

1. That by a joint resolution, bearing date July 16, 1918, the Congress of the United States authorized and empowered the President, whenever he should "deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine, cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war," and that just compensation should be "made for such supervision, possession, control or operation, to be determined by the President."

2. That thereafter, under and by virtue of the powers vested in him by the said resolution, and by virtue of all other powers thereto him enabling, the President of the United States, by a proclamation dated the 22nd day of July, 1918, took possession and assumed "con-
8 trol and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto, whatsoever, and all materials and supplies."

3. That in and by said proclamation, the President of the United States directed that the "Supervision, possession control and operation of such telegraph and telephone systems" thereby by him undertaken should be exercised by and through the Postmaster General, Albert S. Burleson, and that the said Postmaster General might perform the duties thereby and thereunder imposed upon him so long and to such an extent and in such manner as he should "determine, through the owners, managers, boards of directors, receivers, officers and employes of such telegraph and telephone systems," and that until and except so far as said Postmaster General should "from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers, and employes of the various telegraph and telephone systems" should con-

tinue the operation thereof "in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners or managers, as the case may be."

4. That at the times the messages set forth in the complaint were filed with the defendant for transmission and delivery, the said defendant was, and it is at the present time, operating its property for the Government of the United States, under the direction of Albert S. Burleson, Postmaster General, and it holds all current revenues of the company subject to the order of the said Postmaster General.

5. That by reason of the fact that at the time the said messages were filed for transmission and delivery, the defendant was not operating the property in its own behalf but solely in the behalf
9 of the Government of the United States, the present cause of action cannot be maintained against it for the alleged delay in transmitting and delivering the said messages.

WILLCOX & WILLCOX,
Defendant's Attorneys.

Testimony.

S. B. POSTON, sworn.

Direct examination.

By Mr. Arrowsmith:

I live at Johnsonville. I raise and handle cotton there. I also buy and sell cotton.

Q. On the 2nd day of October 1918, did the Western Union Telegraph Company maintain an office at Johnsonville?

Mr. Davis: We object. That is question of law to be decided by the court.

Court: No, it is a question of fact.

A. They did.

Mr. Davis: I object on the ground that whether or not the Western Union maintained an office at Johnsonville is a question of law to be determined under the United States statute of July 16, 1918, and the proclamation of the President of July 22, 1918, thereon.

Court: Objection overruled, and the testimony admitted.

Q. You say they did?

A. They did.

Q. On that day, did you deliver a telegraph to the Western Union Telegraph Company at Johnsonville?

A. Yes, sir.

Mr. Davis: The same objection.

Court: The same ruling.

Q. Addressed to whom?

A. W. B. Ravenel and Co., Charleston.

Telegram from Poston to Ravenel and Co., dated at Johnsonville, S. C., 12.20 p. m., October 2, 1918, offered in evidence and marked Exhibit A.

10 I received a reply to that message on the 3rd of October. It was delivered to me about 11 o'clock, as best I remember, on October 3rd.

Telegram from W. B. Ravenel & Co. to S. B. Poston, dated at Charleston, 5:03 p. m., October 2nd, offered in evidence and marked Exhibit B.

Q. Did you at that time answer Mr. Ravenel's telegram?
A. I did.

Telegram from S. B. Poston to W. B. Ravenel & Co., dated 1:24 p. m., October 3rd, offered in evidence and marked Exhibit C.

At that time, I had in my possession cotton meeting the description contained in Mr. Ravenel's telegram.

Q. Tell us how you disposed of the cotton, and where it was?
A. When I wired Mr. Ravenel to get the best offer he could on 200 bales of cotton, he wired me back, I replied to the message as the telegram shows there, about the same day, and the message was delivered, but it was so late that he couldn't sell it at the offer he wired. The market continued on down for several days, and I had to sell and the result was I couldn't get but 30 cents, while if the message had been handled properly, I could have gotten 32½ cents.

I have made a calculation as to the amount which I would have received, or the damage that I sustained by reason of that fact. The figures set forth in the complaint are about right, I think. I don't remember. I think they are exactly correct.

Q. Now, Mr. Poston, after this delay in the transmission and handling of various telegrams, did you overhear a conversation between Mr. Gaitley at Johnsonville and myself?
A. Yes, sir.
Q. Who was Mr. Gaitley?

11 A. He was the agent of the Western Union Telegraph Company there or claimed to be. He was in their office. I remember that you asked him if the message was relayed to Charleston or sent direct or whether relayed at some other point of the W. U. Telegraph line, and he said he handled the message direct to Charleston.

There was nothing else I know of than the delay in these telegrams which prevented my selling these two hundred bales of cotton at 32½ cents. In other words, I thought I had sold until it was too late. No notice was given me by any agent or servant or employee of the Telegraph Company that these messages were accepted subject to any delays that might occur. In other words, the agent told men there he had delivered them. I asked him in the afternoon that I gave him the first message if he had gotten the message through and he said "I have," and, well then I didn't question why I didn't hear from Mr. Ravenel and the next day he brought me

his wire and I wondered at what was causing the delay, but never noticed it at the moment. As soon as I could notice it, I followed him back to the office and gave him a telegram, and at that moment I thought the cotton was sold, and loaded it and shipped it except what I had already shipped to him. I was not advised for some time after that that the cotton was not sold. I received a letter from Mr. Ravenel.

My place of business is, I suppose, about 150 yards from the office of the Western Union Telegraph Company in Johnsonville. They deliver telegrams there, have been delivering them to me.

I don't think there was a single case of influenza in Johnsonville on the 2nd and 3rd of October, the best I remember. The agent of the Western Union Telegraph Company was not at that time affected in anyway. I saw him and talked with him two or three times each day on the second and third days because I was interested in the cotton.

12 I know where both Mr. Ravenel's office and the Western Union office in Charleston are, but I do not know exactly the distance between. I judge it to be about two hundred yards, the best I could guess it—I believe about two hundred yards. I may be mistaken about that.

Cross-examination.

By Mr. Davis:

I don't know that I had a bale of cotton on storage in Charleston at that time.

Q. You said in the telegram to "sell two hundred bales you have." You had that in Charleston, didn't you?

A. No, sir. I didn't have two hundred bales in Charleston. I had shipped some to him already and I didn't know whether it had reached him, and I told him to sell what he had and the balance being loaded today and tomorrow—sell two hundred bales. I meant to sell two hundred bales—what he already had and the balance to be shipped today and tomorrow. This cotton averaged about five hundred pounds to the bale.

Q. This is not a question of average, but a question of absolute accuracy—the suit on your part is for the loss of two and one-half cents per pound and I want the exact weights.

— I can figure that up for you. The total is 43,350.

Q. So you are suing for 43,350 pounds at 2½ cents per pound?

A. I want the difference, what I was caused to have lost.

Q. That is the basis of your claim?

A. Yes, sir.

Court: That is the basis of your claim. The jury has got to have definite proof as to the amount of damages.

Mr. Davis: And part of our defense is that there was no such decline.

Court: In order to ascertain the amount of damages, you must

know the amount of pounds of cotton, and what was the difference.

13 A. Two and one-half cents a pound was the difference on basis middling. It was sold on the 18th of October, and I am suing for the decline in the market from the 3rd of October to the 18th. We did have an epidemic of influenza at Johnsonville. Business around Johnsonville while that epidemic was in progress was pretty dull. At that time the United States Government had to send two physicians to relieve the sickness and suffering in that community.

Q. And the conditions there were such on account of this epidemic late in the fall that the government had to take a hand in it?

A. I suppose they sent them there. Two came there and I understood they sent them and they were very much needed.

Q. As a matter of fact, the epidemic at Johnsonville was such that practically everything was suspended in the community?

A. Business was very dull, up and down, and it was pretty hard to handle. I don't remember whether the telegraph office there was closed. The agent there had the "flu" on one occasion, but had a man in his place, but I don't remember whether the office was closed or not. I don't remember whether a number of telegraph offices throughout the State were closed. At that time, I took two daily newspapers, The News and Courier and The State.

Q. You read The News and Courier constantly, don't you?

A. Yes, sir, pretty well.

Q. You were taking it in October, 1918, were you not?

A. Yes, sir.

Q. At the time you sent these messages?

A. Yes, sir. Mr. Ravenel finally sold the cotton for me. He had it in charge from the 3rd day of October, after it was ship-
14 ped—I think I finished shipping the 3rd day, and he had it in charge from this on until it was sold and that was the 18th. I know cotton was declining between the 2nd and 3rd.

Q. Suppose I produce the official figures from the city of Charleston showing that there was no decline, will you still say there was a decline?

A. I don't think you could produce it.

Q. If I produce the official figures from the Charles Cotton Exchange showing no decline until Saturday of that week, will you still say it declined?

A. I know that it was in decline on New York.

Q. I asked you about Charleston; will you say in the face of those figures that it declined?

A. I say at that time.

Q. Will you attempt to discredit or dispute the figures of the Charleston Cotton Exchange?

A. No, sir, I don't know what they were doing.

Q. Do you know of your own knowledge anything about the Charleston market.

A. Only what I read in the paper from the cotton brokerage quotation.

Q. But nothing of your own knowledge. You were not there?

A. No, sir, I was not there. I don't know exactly what time that cotton arrived in Charleston. I don't remember how much was there when I sent the second telegram; in fact I had shipped some cotton a few days before I sent the telegram and had cotton on the platform at the time, had finished loading it and shipped it the 2nd or 3rd of October. I have sold a good many lots of cotton and shipped it after it was sold to the party and they handled it. I don't know when you got it there. I sent the bill of lading to Mr. Ravenel.

W. B. RAVENEL, sworn.

Direct examination.

By Mr. Arrowsmith:

15 I am now and have been for 44 years in the cotton business in Charleston. I know what the Charleston Cotton Exchange is. I am a member of it. I am familiar with its rules and with its method of handling business. I am a member of the firm of W. B. Ravenel & Co., being the W. B. Ravenel, Sr., named there.

Q. On the 2nd day of October, did you receive this piece of paper from the Western Union Telegraph Company at Charleston?

A. I received it at 4 o'clock, and so recorded on there, that is my handwriting, recorded as being received at 4 p. m. As a result of that inquiry from Mr. Poston, I sent him an offer of 32½ cents for prompt reply. My answer was "Can sell two hundred bales 32½ cents basis middling landed Charleston * * * subject to prompt reply," which means we must have answer that day if they are going to sell. I put that word "rush" on the telegram to make the telegraph company get it off immediately, to rush it. Carbon copy of message sent to Mr. Poston offered in evidence and marked Exhibit D. At the time I sent that telegram advising Mr. Poston that I would sell two hundred bales at 32½ cents, I had had an offer made for it. In other words, if I had gotten his reply, I could have sold it that afternoon at 32½ cents. I received a reply from Mr. Poston next day. It was received at 4:40, as appears from the record my bookkeeper put on the message at the time. The Cotton Exchange in Charleston closes at 3 o'clock. The first telegram was received at 4 in the afternoon. The last telegram was received at 4:40 in the afternoon and after the Cotton Exchange had closed.

Q. Answer me this question, whether or not you can always sell cotton on the Cotton Exchange in Charleston at the price appearing on the Cotton Exchange board in Charleston?

A. You cannot by a great sight.

16 Q. So, therefore, is it or not true that very frequently the price of cotton will remain at one figure, say for instance as in this case, 32½ cents, several days when, as a matter of fact you cannot sell cotton?

A. That is absolutely correct.

Q. Now in this case, when this cotton was received by you—I will ask this, did you continue to try to dispose of Mr. Poston's cotton at the best price you could get?

A. I can't say we went on trying to dispose of it, because the market was going down and there was no sale for cotton. I tried to dispose of their cotton, but there was no sale for it. You could not sell cotton you had: the market was declining

Q. When was the first time you could sell Mr. Poston's cotton?

A. I think—whatever the date of sale is.

Q. That was the first time you had an actual market for that very cotton?

A. The date of that sale there. The spot market for cotton is controlled very much by the future market. The future market declined from 32.10 on October 2 to 29.92 on October the 18th, the day we sold that cotton. During that time there was no market for this cotton that we could sell on.

Q. Now look on the record and refresh your recollection and tell me when is the first quotation—or notation of cotton being sold on the Exchange in Charleston after the 3rd of October?

A. On the 3rd—on the 8th of October twenty-five bales reported as being sold.

Q. Do you know anything about the circumstances of the sale of that cotton?

A. I do not.

Q. Were you able to sell any at that time?

A. No, sir.

Q. Do you know the price at which that cotton was sold?

A. I see it reported at 31¼, but I do not know that it was sold at that time.

Q. Look ahead, please?

A. But I also see that the cotton futures market had de-
17 clined very considerably, so I know—let's see, on this paper it says the market had declined a cent and a quarter.

Q. Tell us about the future market decline.

The Court: That book is the records of the Exchange?

A. Yes, sir.

The Court: Is that one of the reputable Cotton Exchanges of the country?

A. Supposed to be. What is the question?

Q. As to the condition of the future market on the date the twenty-five bales were sold, October the 8th, 1918?

A. The 8th, that was the date.

Q. The date that you said the first sales that you saw after October the 8th and you didn't believe they were sold for 31½.

A. I say I don't know. On October the 8th the market is quoted at 31¼.

Q. What is the spot or future market?

A. The future market for March cotton, on which we were basing it was 31.09.

Q. The spot market——

A. Wait a minute, that spot market ended at ten o'clock. It opened at 30.93 and went to 30.90 and back to 31.09 and back to 30.85 and then to 30.70 and 31.07 and closed at 29.93, variations in market during that day. Now, when the future market is still any time during the day, you can't tell what it may be——

Court: That is the price for cotton delivered where?

A. Delivered in Charleston. These are prices on the Charleston Cotton Exchange on twenty-five bales at 30¼.

Q. Now, Mr. Ravenel, I want you to tell me with reference to the delivery of cotton, whether or not if a man would telegraph you, as Mr. Poston did in this case, to sell two hundred bales and would get them off in Johnsonville, what would be the limit of time you would have to deliver the bales of cotton?

A. The rule as I have always understood it in Charleston is ten days.

18 Court: What are the hours that you do business on the cotton exchange, buying and selling of cotton during the day?

A. From ten o'clock the Exchange is open until three, but you can sell in the afternoon if a man is willing to buy and run the risk of the market going against him in the morning. A man can buy cotton any time during the day, but the Exchange proper is closed at three o'clock, but if you want to sell in the afternoon and a man is willing to buy and take the chances, you can go ahead.

Q. Can you explain to me why it is that the cotton market may be posted at 32 cents in Charleston and the best actual price that you can get for it is, say 25 cents, whether that is the Cotton Exchange price that appears on the board?

A. God alone can tell you, I can't. I have seen prices there and the future markets which govern the spot market very considerably declined and yet leave the same price there and why, they did have that rule—I don't know whether it has been rescinded—the price once put upon the board could not be changed unless a sale of fifty bales had been made, and that was the rule at one time, but whether it was rescinded or not I don't know.

Q. Can you force any cotton exchange member to buy your cotton at the price marked on the board?

A. Not by a good sight. I wish I could.

Q. You testified you made the best sale you could for Mr. Poston?

A. Yes, sir, we did.

Q. I will ask you if this cotton was received in time to have made the delivery?

A. Oh, yes; otherwise we could not have delivered it on the sale we made, you see. I have no recollection of the exact time that this cotton was received. The cotton was there to be delivered, that was a fact; in fact, what date it came I can't tell you without my book before me. That is only a guess at it. I made the report of sales that Mr. Poston had, which I now identify. That is the cotton which was received by us. It was sold on the 17th of Oc-

19 tober basis 30 cents middling cotton. That is on our sales.

Q. We want to offer these bales in evidence, report of sales of two hundred bales.

Court: If you show the market price was different on the day that this cotton should have been sold, was different, why that price would govern. It may be the same as that. That simply goes in as tending to show that.

A. Here is the evidence of the Charleston Cotton Exchange on that day—30¼.

Mr. Davis: I am not interested in that. I am interested in the 32½ cents on October the 3rd.

Q. I will ask him about that and save you some trouble.

Mr. Davis: Go ahead.

Q. On the 3rd day of October, what was the Cotton Exchange board showing?

A. The Cotton Exchange on the 3rd of October was 32½ cents for middling.

Q. Could you sell cotton for 32½ cents middling on that day?

A. If I couldn't, I would not have made Mr. Poston the offer.

Q. That was the 2nd?

A. 32½ cents.

Mr. Davis: I am not going to object. I want to state our position. If the market price that he testified to could not be had, if he could not sell in Charleston it was his duty to sell anywhere else in a reasonable distance where there was a market. Judge Smith in a recent case where they testified that there was no market in Augusta, the place of delivery, held that cotton was a staple and there was a market somewhere.

Court: Yes, sir, cotton is always worth something, and it is for the jury to say how much, and if the testimony shows or enables them to arrive at what it was worth when the telegram was received, and they were in a position to sell——

Mr. Davis: I don't want to be held down to this Charleston market.

20 Q. Do you know of any other place you could have sold this cotton on the 3rd?

A. No, sir; my experience—and I have been in business 44 years, and I have never seen it so hard to sell cotton as it was last fall. I suppose it was due to war conditions or something of the kind, and cotton was very hard to sell. It was running the same way—where I could sell against their future market when I wanted to, but in Charleston you could not, and my impression was that you could not do it in Savannah or Augusta either, very hard for them to handle the cotton business. The distance from our office to the telegraph office in Charleston is such that I could get there in about three minutes.

Q. Can you give me an idea of what cotton was actually worth, what you could have sold this cotton for on the 3rd? I don't mean the market price, but what could you have sold the cotton for?

Q. The difference in the price posted on the board——

Court: Yes, sir, but that is only evidence of the market price, that is, the market report, but if he knows what cotton was actually selling for that day?

A. None sold on that day.

Court: The day before and after?

A. All I know is that there wasn't anything doing at all. The market was on the decline and the buyers evidently thought they could buy cheaper and they held off. I have never seen such a scene in my life.

Court: It was worth something?

A. But you can't get a price and close it to your satisfaction. Cotton is only worth what you can get for it.

Court: Take the question what it was sold for before and after the 3rd. You can give the dates. The jury will have to calculate what it was on that day.

A. May it please your Honor, while a sale may be made it doesn't mean everybody can sell cotton on that day; a man may
21 have twenty-five bales of cotton that he can sell to a particular man and it may be that you can go and sell that cotton at some price.

Court: But I don't have to go and give it away. The jury will be the judges.

A. The fact that a man can sell twenty-five bales of cotton does not mean that you can go and sell one hundred bales.

Court: No, sir, but that is some evidence.

A. You may go into the Exchange and you may find a man that had twenty-five bales that somebody will buy, and you can go and try to sell the same man and you can't. There is one thing and that is that you can't make a man take what he doesn't want. I made the best effort I could to sell this cotton.

Q. And the best price you could get for it was the price you did get for it?

No answer.

In the forty-four years that I have done business, I have gone out of Charleston to Savannah, and Augusta and other markets to dispose of the cotton I had. I haven't done it recently. I made no effort to sell this cotton on any other market. I do not know the rules, if any, between Charleston and Savannah.

Q. Is it the custom of the Exchange there when cotton is declining to call other exchanges to inquire if they can sell?

A. I don't. I don't know what the other people may do, but the man that I sell to, he may be trying them, and if he can't make a sale, he doesn't take my cotton.

Q. The people that you sell to in Charleston what do they do with it?

A. They sell it all around. If they won't take it, then it is because there is no sale for it on the market in Charleston and it is reasonable to assume that the brokers in Charleston cannot sell on other markets—reasonable to surmise they cannot.

22 Cross-examination.

By Mr. Davis:

Q. Under whose instructions did you hold this cotton for fifteen days without selling it?

A. Under whose instructions I did what?

Q. Did you hold this cotton for fifteen days without selling it?

A. Without anybody's instructions.

Q. On your own responsibility?

A. Yes, sir.

Q. And got caught with a low price and are now attempting to throw your responsibility on the Western Union Telegraph Company?

A. No, sir, it is the responsibility of the Western Union Telegraph Company.

Q. Why do you maintain that Cotton Exchange if it is not reliable?

A. You will have to ask the man who runs it.

Q. Aren't you a member of it?

A. Yes, but I don't run the Exchange.

Q. But you are a member of the organization and come and tell this court that its quotations are not to be relied on at all?

A. You asked me to tell you——

Q. Answer the question?

A. I don't think those cotton quotations are always reliable. Yes, sir, I don't hesitate to say so.

Q. Why do you maintain that organization?

A. I don't maintain it.

Q. Why do you allow your city to countenance an organization like that?

A. I don't maintain it. I am simply a member of it.

Q. Why don't you sever your membership?

A. I don't want to. It is my privilege to belong there, but at the same time, I can't rule the whole Exchange. I am simply one member.

Q. It is unreliable——

A. I have seen the figures on the Exchange when I didn't consider them reliable.

Q. Turn to the 2nd day of October and let us get some figures for this jury?

A. Give me your last date now.

23 Q. October the 2nd.

A. October the 2nd, at that time the cotton market was 32½.

Q. This was the telegram sent and that was the price that you wired him?

A. That was.

Q. Go to October the 3rd?

A. All right, that is quoted at 32½ cents.

Q. All right and——

A. That was why I couldn't sell.

Q. Did you try?

A. No, wait a minute; what was the use of trying something you knew you couldn't do when the market had declined in futures?

Q. Did you try?

A. No, sir, because—why should I try when his telegram wasn't given to me until 1:40 in the afternoon, after the Exchange had closed?

Q. Why did you tell me a minute ago that you didn't try because futures had declined?

A. I didn't sell only Mr. Poston's cotton. I have other cotton to sell.

Q. Go to the next date, the 4th?

A. 32½ cents—market still declining on futures.

Q. I was not asking about futures, but was asking you what spot cotton was quoted on that day?

A. 32½.

Q. And you are a member of that Exchange?

A. Yes, sir.

Q. And you help maintain it?

A. I am only a small member and not the committee that rules the quotations, and have nothing to do with that.

Q. And you mean to come to Williamsburg County and tell the jury here that your Exchange quotations in Charleston are unreliable?

A. If you want me to tell you the truth——

Q. Answer the question.

A. I am answering the question.

Q. Why do you maintain something that you now say is untrue?

A. I don't maintain it; I am simply one small member.

24 Q. You help it?

A. Only a member and there is a committee that runs its quotations, and I don't maintain that.

Q. Why don't you reform that committee or Exchange?

A. I am not there to reform that Exchange.

Q. You prefer to leave it to a committee?

A. The committee does the quoting and I don't have anything to do with it.

Q. And then come here and say that the quotations are unreliable?

A. I think so.

Q. Absolutely unreliable?

A. I didn't say always, nor most of the time, but sometimes they are.

Q. Tell me whether or not they were reliable on the 2nd of October and also on the 8th?

A. They may have been reliable on those two days.

Q. Didn't you handle some cotton on the 2nd of October by this Exchange?

A. On the 2nd of October?

Q. Yes, sir?

A. No, sir, I did not.

Q. You didn't sell Poston's cotton on the 2nd for 32½?
A. No, sir.
Q. How about the 3rd?
A. I see there 32½ for prompt reply and could have sold that afternoon, but his telegram did not get to me until the next day and long after the market was closed—at 4:40.
Q. And that was on that day?
A. Yes, sir.
Q. 32½ at the time you had the offer?
A. Yes, sir.
Q. And then on the 8th?
A. It was 30.
Q. The same price that you sold the 25 bales for?
A. What is that date?
Q. The 8th?
A. Oh, my sale wasn't on the 8th.
Q. I am talking about the bulk of cotton that was sold that Mr. Arrowsmith examined you about?
A. My sale wasn't on the 8th.
Q. I am not asking you about your sale, but about the sale Mr. Arrowsmith examined you about?
A. My sale was made on the 18th of October.
25 Court: He is asking you about a lot of 25 bales of cotton sold on the 8th. What price was that sold at?
A. 31 cents.
Q. What was the price posted that day?
A. 31 cents, the same price.
Q. Go to the 18th?
A. All right, as far as I can see 30½.
Q. 30½?
A. Yes, sir.
Q. What did you get for your cotton that day?
A. 30 cents.
Q. Didn't get what the market showed?
A. No, sir.
Q. What did you sell the other for?
A. Exactly what I am telling you, that the Exchange quotations here are not what you can always get for cotton. This is very good proof of it.
Q. Go to the next sale?
A. All right, the next sale was 61 bales at 29¼ on October 25th.
Q. Who sold that?
A. I don't know.
Q. Did you sell that?
A. No, sir.
Q. Did you sell all of that on the 18th?
A. I did.
Q. I thought you had made two sales?
A. No, sir, one sale.
Q. What effort did you make to sell that cotton on the 3rd?
A. Made no effort to sell it on the 3rd.

Q. What effort did you make to sell it on the 4th?

A. Made no effort because the thing was off. He had gone to work and asked me to get the best price for 200 bales on the afternoon of the 2nd.

Q. Because the thing was off—where was the other ten days you were telling the jury about?

A. I was only to sell, and you have ten days in which to deliver your cotton.

Q. And don't wait on the ten days at all?

A. We hadn't made any sale. That day I had an offer for 32½ cents for the 200 bales.

Q. On the afternoon of when?

A. On the afternoon of the 2nd at 4 o'clock, and after I saw the buyer and he said he would give 32½ cents, I wired Mr.
26 Poston and the telegram was in the office *of* 5:03, and got no answer that afternoon, and the next day about 4:40 in the afternoon he says, "I will accept your offer," but it was too late.

Q. You never made any effort to sell it on the 3rd, nor did you go to that buyer and make an effort to sell it?

A. No, sir, his offer was for——

Q. Just come down.

Redirect examination.

By Mr. Arrowsmith:

Q. No, I will invite him down. You say that transaction was off?

A. Certainly it was off.

Mr. Arrowsmith: That is the plaintiff's case.

Mr. Davis: We move for a nonsuit on the ground that no damage has been proven. Their own witness says he made no effort to sell.

Court: The question is what he could have sold for, and I think it is a question for the jury whether or not there was any difference in the market, so I will have to refuse the motion.

Defense.

Mr. Davis: I hand you the Proclamation of the President of the United States, and then I hand you the order of the Postmaster General of August 1st, 1918, taking possession of the land lines.

Court: You introduce those in evidence?

Mr. Davis: And then the contract between the Western Union Telegraph Company and the United States Government.

Court: I will admit them.

Mr. Arrowsmith: We object to the introduction of the contract as his answer sets up no contract; and as far as the government having by the Act of Congress authorized the President to make this
27 proclamation, is the law. It does not authorize any contract.

Court: I will rule it in evidence and rule on the effect of it afterward.

Mr. Davis: I have a paper which I am frank to say I don't think is competent. It is a construction of this statute by the Solicitor General of the United States.

Court: That cannot go in evidence at all.

Papers marked Exhibits 2, 3 and 4.

Mr. Davis: I think that completes all the record evidence that we have at the present time.

R. R. JERVEY sworn.

Direct examination.

By Mr. Davis:

I am superintendent of the Charleston Cotton Exchange. I have the original records of the Charleston Cotton Exchange. Referring to these records, spot cotton was worth 32½ in Charleston on October 2, 1918. It was worth on October 3rd, 32½. It was worth on October the 4th, 32½. It was worth on October the 5th, 31½. There was no decline in the market of spot cotton until the 5th of October. These are the official figures of the Exchange. These prices were made up by a committee, consisting of six members. Between 2 and 3 o'clock they get the quotations up and in fact I telephone around to different members and get it up and I get these prices—several prices and I give it to the chairman of the committee. The prices I get are turned over to the committee for making up the official quotations and are based on actual sales made that day.

Court: What did you say the price was on October 5th?

A. It declined to 31½ on October the 5th. I get these prices on actual sales made on any day. I telephone them to the chairman of the committee of six that makes up the quotation for that day, which is posted. All cotton sold in the city of Charleston is not reported in the Exchange. I know all the buyers there. I don't think they are all members of the Exchange. Sales have been made and never appeared on the Exchange.

28

Cross-examination.

By Mr. Arrowsmith:

The Exchange had a rule that when a price is put on the board it stays there until a fifty bale sale has been made, but it has never been followed. Whether followed or not, that is the rule. We have New York quotations on this Exchange.

Q. Mr. Davis asked you what spot cotton was actually worth on the 3rd day of October. Did you sell any?

A. No, sir. I have never sold any. I do not know what cotton is actually worth at any time except on the market. I don't sell any and don't know what it is actually worth. I do what I am told to.

Q. You are told to put the figures on the board?

A. Yes, sir.

Q. And told to leave them there until somebody else tells you to put something else up?

A. Yes, sir.

Q. I believe you testified to counsel that the quotations are made from actual sales?

A. Yes, sir.

Q. How do you put a quotation on a day of no actual sale, will you answer that?

A. Yes, sir. The quotation would not be changed until we got a sale.

Q. And then that is put on the board and stays there until a sale?

A. May have been sales made and not reported.

Q. So, therefore, as a matter of fact, you don't know anything about it, and as a matter of fact, the Cotton Exchange figures
29 are not correct?

A. If the sales were made, it would have been reported and put on the board.

Q. And you would have them on the book?

A. Yes, sir.

Q. And when you go and see no sale made, you get no quotation in Charleston?

A. Yes, sir, and the quotation stands right there.

Q. Regardless of what the actual market, the quotation stands there?

A. It is arrived at by the committee.

Q. I am not blaming you.

A. I am telling you a fact.

Q. It is put on there Monday 32½ cents and stays until a sale and changed?

A. Every day the committee finds it out and approves it all and puts it on.

Q. Do you know when to call and where?

A. I have got to do that.

Q. You have got to call up the committee?

A. Yes, sir.

Q. You don't know what the committee do?

A. They give me the quotations to put on the board for that day.

Q. You don't know how they come at that?

A. Some of the members know from the rule of the Exchange what they ought to do.

Q. Now as a matter of fact, isn't this the case; doesn't the Cotton Exchange in Charleston always post a price higher than the cotton market in order to bull the New York Exchange?

A. No, sir; I don't think so.

Q. Don't you know that is the rule and when cotton is actually selling for twenty-five or six cents in Charleston that they have it marked 30 or 31 cents?

A. I do not know it.

Q. Will you deny it?

A. No, sir; I can not.

Q. If this committee probes it and finds out the sales and finds out what cotton is actually selling for, why are those sales not reported in that book? That is the official record, isn't it?

A. Yes, sir.

Q. Why is it you have got to take a copy when—as a matter of fact, what Mr. Ravenel said about the thing is absolutely correct?

A. They should give me the sales, but sometimes they don't.

—. And therefore the thing is indefinite?

A. I don't know what they do about it at all.

Q. I will ask this—don't the members of the Cotton Exchange as a general thing take the same view of the authenticity of these quotations that Mr. Ravenel takes and that you have admitted is true?

A. What is that question?

Q. Don't the members of the Exchange take the same view of the authenticity of the quotations on the board that Mr. Ravenel has testified that his opinion was, and which you have admitted is true?

A. Yes, sir; I think so.

Q. You don't handle any cotton yourself?

A. No, sir.

Redirect examination.

By Mr. Davis:

Q. Did you understand Mr. Arrowsmith's question? Did you understand that the general committee in Charleston—not the general cotton people in Charleston——

Mr. Arrowsmith: That is not in reply to any question that I asked and I object.

Court: I didn't catch that.

Mr. Davis: Mr. Arrowsmith asked him didn't the members of the Exchange take the same view about it as Mr. Ravenel.

Court: If he knows, he can say so.

Mr. Davis: I am going to ask him the question if the general opinion was that it was a fraud?

Mr. Arrowsmith: I didn't say fraud.

Mr. Davis: That is what Mr. Ravenel testified.

Mr. Arrowsmith: No, sir, he didn't.

Court: You can ask him the question.

Q. Do those who are not members of the Cotton Exchange think it was a fraud?

A. I would not be connected with it if I thought it was.

Q. Would you be engaged in an institution like that?

A. No, sir, I would not.

Mr. Arrowsmith: I want to say here that Mr. Ravenel never made any such statement as that.

ANNIE MAY SMOAK, sworn.

Direct examination.

By Mr. Davis:

My profession is telegraph operator. I work in the main office in Charleston. I handled one of the telegrams involved in this suit. It was number one, from Johnsonville.

Q. At the same time, look over those?

A. Yes, sir.

Q. Do you notice what operator handled those that you have?

A. Operator E. C.

Q. Who is that?

A. Miss Pearce.

Q. Where is she?

A. She is sick.

Q. At the present time?

A. Yes, sir.

Q. When was that telegram actually received in Charleston?

A. At 12:23 in the afternoon on the 2nd day of October.

Q. Does it show the hour that it was filed at Johnsonville?

A. Shows it was filed at 12:20.

Q. So it was three minutes on the wire from Johnsonville to Charleston?

A. Yes, sir. After I received the message, I placed it on the file. This is a wire hook, and the boys in the process of delivery get all telegrams from there. I do not know when that message was delivered.

Q. I will ask this—what was the condition, if you know, of the office in Charleston at that time with reference to the influenza epidemic?

Mr. Arrowsmith: We will object.

Objection overruled.

During the epidemic of "flu," we were up against it as our
32 operators were, a great many of them, were out of the office. We were very short of help during the epidemic of "flu." I don't remember when that started. Our help was very deficient during that time. I don't know anything about the delivery force, but the operators were short. I was in the operating department.

Cross-examination.

By Mr. Arrowsmith:

Our office was 145 East Bay street. That is where I was working on the 2nd and 3rd of October. No. 133 East Bay street is about one-half a block away, I suppose. The Western Union Telegraph Company about the 2nd and 3rd of October were remodeling the building.

Q. And that was the cause of a great deal of confusion in your office, wasn't it? Had the floor up, didn't they? Don't you recall that?

A. I am not in the delivery department, but in the operating department.

Q. You were a telegraph operator at the place where the instruments were? Was it not disrupted at the time—the 2nd or 3rd of October, and were you not in a great deal of confusion because of the fact that they were remodeling the office?

A. Where the instruments were?

Q. Yes, ma'am.

A. I don't recall that it was on that day.

Q. What about the delivery department; you don't know where it is?

A. No, I don't recall.

Q. But you do recall, or I will ask you, if you do recall from November the 17th—or from June the 18th to November the 17th, the Western Union Telegraph was doing business at both of those places because of the confusion called forth by the remodeling of its larger office; that is a fact, isn't it?

A. At some time we were remodeling.

Q. About that time? Between June and November?

A. I don't know what time it was. I can't recall when the influenza epidemic became prevalent in Charleston. I can re-
33 call when the operators were out. They were out during this epidemic of "flu." We had numbers of our operators out. I can't recall whether any of the operators were sick on the 2nd and 3rd of October. They were out of the office on the 2nd and 3rd, during the epidemic of "flu."

Q. You handled the wire from Charleston to Johnville?

A. I did on this message. I handled this message. There was no delay in regard to it. It was filed at 12:20 and I received it at 12:23. Influenza on the part of the operator could not have been the cause of the delay in delivering it to Mr. Ravenel as I received it at 12:23.

Q. And you did your part very promptly. What does this C. N. here represent?

A. That is the Charleston call.

Q. Can you tell me from looking at this telegram who sent it or handled that from Charleston?

A. That was sent from Johnsonville.

Q. You are unable to tell me what operator in Charleston sent that?

A. No.

Q. At any rate, would you venture the opinion that that operator did not have influenza?

A. Why, I am unable to say. I don't know about that.

Q. If he did have influenza, he was certainly working when he sent this telegram—that's true, isn't it?

Court: Speak out, if you know.

A. I am unable to say about that one.

Q. You are unable to say whoever sent this telegram here was working at the time he sent it?

A. What?

Q. That they were working at the time they sent this telegram, and if they had influenza it was not sufficient to keep them from sending this telegram?

No answer.

Q. All right, I will ask you whether or not you will say you did not receive this telegram?

A. Suppose that shows that.

34 Q. Who sent it?

A. That was received in Charleston.

Q. I want to find out——

A. Where was it sent from?

Q. I am sure I don't know.

A. We never received or sent the message.

Q. Can you say you did not send this telegram?

A. My signature is not on it.

Q. But in the absence of that information, can you tell me whether you did send it?

A. I am unable to say.

Q. How many operators did they work in Charleston?

A. I am unable to say exactly.

Q. How many were sick on the 2nd of October?

A. I don't know.

Q. How many on the 3rd of October?

A. I don't know.

Q. Were any sick on the 2nd of October?

A. We had during the epidemic of "flu"—they were sick off and on during that entire time.

Q. Do you know when the epidemic of "flu" commenced in Charleston?

A. I can't say the exact date.

Q. Won't you say it didn't commence and was not obtaining on the 2nd or 3rd of October—won't you say that?

A. I am unable to say.

GEORGE A. MCELVEEN sworn.

Direct examination.

By Mr. Gilland:

I am engaged in the cotton and cotton seed business. I was a buyer of cotton during the month of October, 1919. Between the first and second days of October and the 18th day of October of last year, I bought several lots of cotton in Kingstree.

Mr. Arrowsmith: We object to any testimony as to what Mr. McElveen did in Kingstree.

Court: No, sir, but Kingstree is in proximity to where this cotton was in Charleston.

I bought it for Middleton & Co. in Charleston.

35 Q. What prices did you give for that?

A. I could read the prices for different dates. My invoice shows the prices for basis middling that I gave for cotton f. o. b. Kingstree, October the 1st—75 bales at 32 cents.

Court: What date was that?

A. October the 2nd, I sold 55 bales at 31⅞; and October the 4th, 53 bales at 31½; October the 7th, 40 bales at 30¾; and October the 18th, my invoice shows here the date I purchased cotton that is reported that day, and I always bought the day a purchase shows, and take my delivery from the day, and October 18th I sold 100 to 120 and that was the outside. I was to deliver 120 that I agreed to, basis middling, Kingstree.

Q. What date was that?

A. October the 18th. They usually figure the freight at about 23 cents per hundred from Kingstree to Charleston, which would make about ¼ of a cent difference per pound between Kingstree and Charleston. My purchase on the 4th was 53 bales at 31½ cents. That would be, according to my statement, 31¾ Charleston. And the purchase on the 7th was 30¾. Between the 7th and 19th, I had made no purchase—I mean I sold no cotton but this 100 or 120 bales that was sold or was purchased between the 18th and this sale of 100 or 120 bales. The sales were to Middleton & Co., Charleston.

Cross-examination.

By Mr. Arrowsmith:

I buy cotton on the market and offer it. Sometimes I buy—get a little more from Middleton for round lots in 100 or 200 bales than he would give on a little basis middling, and I usually pick up the cotton and offer it to him. I buy it myself partly on my personal account, but not all of it. I sell to Mr. Middleton on basis middling.

Q. How do you sell it, what he will give you for it or what is marked on the Exchange?

A. I offer the cotton to Mr. Middleton on basis middling and he gives me a price and if he can buy it, I sell it to him.

36 Q. Regardless of what is marked on the board?

A. Yes, sir.

Q. I want to ask you if you have not seen the cotton market quoted in the newspaper in Charleston at a price you couldn't possibly sell for in Charleston?

A. Yes, sir.

Q. You have seen that several times?

A. Yes, sir.

Mr. Davis: We object to newspaper records. We haven't introduced anything of the kind, and it is hearsay evidence.

Court: He is showing the difference between the actual transaction and quotations.

The Stock Exchange book shows from October the 2nd to October the 8th on the Cotton Exchange in Charleston only 25 bales sold and showed no sales then until the 11th when 50 bales were sold. During that time I sold Middleton 55 bales on the 2nd, 53 bales on the 4th, and 40 bales on the 7th. I sold him again on the 18th—100 to 120 bales. That cotton when I sold it was on the market here in Kingstree. I always sell the cotton when I get it and get the bill of lading. I don't know how long it takes to deliver it. I get paid as soon as I get the bill of lading. I deliver it to the common carrier here and that is delivery to Mr. Middleton so far as I am concerned.

Q. Why was Mr. Middleton paying above the market for the cotton?

A. I don't know that it was above the market.

Q. You keep up with the market?

A. I look at my cotton data and know what it ought to be worth. I get quotations from the New York market every fifteen minutes. I get those every fifteen minutes and know what cotton ought to be worth. Unfortunately, New York fixes our spot prices. Spot prices are governed by future prices.

Q. I want to ask you why it was that Mr. Middleton was paying you higher than the future price, that is to say, for deliveries at the time?

A. I couldn't tell you that.

Q. Your deliveries at that time—the spot market at the
37 time was based on March cotton?

A. I don't know what month it was based on.

Q. Don't you know that cotton—the spot market in October was based either on December or January so many points?

A. No answer.

Q. Why was Middleton & Co. paying you more?

A. I couldn't answer you why Middleton & Co. was doing that. I don't know anything about that. I know Middleton & Co. paid me for the cotton, what I had in it and that's all I expected.

WILMOT S. GILLAND sworn.

Direct examination.

By Mr. Gilland:

I am in the cotton buying business in the fall. I was engaged in that business in October of last year. I bought and sold cotton on the local market in Kingstree between October the 2nd and 18th. I was the representative of Maybank & Co., Charleston. Between October 2nd and 18th, some days I wasn't in the market and some days I had sales between those dates. My basis at that time, I think

if I remember correctly, was so many points on December or January, I have forgotten. On October the 4th I bought 15 bales on basis of 30⅞ middling. On October the 5th I had a limit on basis middling 30½, and I sold 29 bales that day. On the 7th and 8th—I had a limit on the 7th of 30¼ basis middling and I sold 16 bales. The Charleston market is supposed to be a ¼ of a cent higher than the Kingstree market. That cotton was bought for or sold to Maybank & Co. of Charleston.

Cross-examination.

By Mr. Arrowsmith:

Q. It is in evidence that cotton was quoted on Charleston Cotton Exchange on October the 4th—you say on that date your market was 30⅞?

A. That is the basis I have down here. On the 5th my
38 basis was 30½. On the 8th my basis was 30½ and in Charleston it was quoted 31¼ on the Exchange market on the board.

Q. Is it or not a fact that it is very frequently the case that you can't sell your cotton in Charleston?

A. I know nothing about it. I don't make sales in Charleston. Sometimes I am taken off the market. I don't know the reasons I am taken off, unless it is no sales for that cotton or unless operating on the decline of the market. I have seen cotton quoted in the Charleston News and Courier at a very much higher price than I was able to get for it here or dispose of it in Charleston. These were Charleston Cotton Exchange quotations.

W. O. Gaffney, sworn.

Direct examination.

By Mr. Davis:

I am manager of the Charleston office of the Western Union Telegraph Company, and was such manager in October, 1918.

Q. I wish you would state whether you know of your own knowledge anything with reference to the handling of these telegrams?

A. Yes, sir.

Q. I will ask you to identify those telegrams and take them and see if you have any personal knowledge as to the handling of them?

A. I find that October the 2nd, there was at 5:03 p. m. a message to S. B. Poston at Johnsonville which was handled by our office.

Q. How does that read?

A. "Can sell 200 bales basis middling * * *" (reading).

Q. That message was handled by your office?

A. Yes, sir.

Q. What time was that received for transmission?

A. 5:03 in the afternoon of October the 2nd.

Q. Go to the next?

Court: Are you going to ask him anything about that message?

39 Q. No, sir, I will ask him about it when I get through.

A. The next is the telegram handled through our office as one from Johnsonville on October the 2nd.

Q. That is the first one?

A. That read "Best offer can get 200 bales cotton * * *," that is evidently the first telegram.

Q. When was that telegram received in your office?

A. 12.23 p. m., October the 2nd.

Q. Now, take the last one—the one from Mr. Poston back on the 3rd.

A. (Reading telegram).

Q. "Which" is the word, "what" in the complaint, and that message was handled in your office?

A. Yes, sir.

Q. When was that message received and delivered?

A. Received at 3.30 on the afternoon of October the 3rd. I was in charge of the office in Charleston on the 2nd and 3rd of October, 1918. Influenza appeared in our office the last days of September. It reached the alarming stage on October the 2nd. Prior to the reported sickness of the delivery supervisor, several messenger boys were reported out and failed to report for duty and we were advised that it was on account of influenza.

Mr. Arrowsmith: Is that not hearsay?

Q. Not hearsay because a general epidemic.

Court: I don't know about general epidemic. He can state that they were not there and that they gave that as their reason.

Q. How many men did you have in that force in your office?

A. We had 26 clerks in the delivery side, and from 20 to 27 or 28 messengers.

Q. How many of that force were out during the general epidemic in Charleston?

Mr. Arrowsmith: We object.

Court: On these particular days.

Q. He said he had this on the 2nd of October.

40 Court: How many absent on October the 2nd?

A. I have no record to show the number.

Court: Did you try to fill their places?

A. Yes, sir. I went so far as to bring my wife and little boy in the office on that day. I placed my fourteen-year-old son at the telephone for the specific purpose of phoning all these cotton quotations to the Cotton Exchange. I was compelled to take out the telegraph system and substitute a telephone system, and Mr. Jervey received the telephone messages and cotton quotations in the cotton office in the absence of his employees.

Q. What with reference to the general delivery of messages, ex

plain how they were delivered to the Cotton Exchange and with reference to the general delivery—could you supply the places of the sick messengers and clerks?

A. No, sir. I personally went on the streets and phoned two or three and asked them to assist me in securing some help and also phoned the employment service manager and asked for special messengers on account of the shortage of the boys. The same conditions prevailed among the operating force of the office. It developed a little later—I mean developed in the clerical department sooner than in the operating department. It developed in the operating department or the delivery department the latter days of September. We were short of operators. I can't say exactly the number, but on or about the 1st of October we were short, I should say, three or four. Conditions continued to grow worse rapidly and we had requests by one of our offices to loan operators and we couldn't do it, because our force showed indications of getting worse. The State quarantine had not been declared. It was declared on October the 5th. Around October the 2nd we were having an average of 200 to 250 new cases a day in Charleston. We were working under very great disadvantages, with an abnormal amount of business.
41 This was due to influenza.

Q. State what it was, in what way?

A. More than half of the business handled was relating to sickness on account of influenza, passing back and forth from and to relatives; also, the Government headquarters were very active in their efforts to master the situation and render assistance, and they were filing telegrams on the subject in great volumes every day and had been for several days.

Q. Were those telegrams, any of them, with reference to procuring medical assistance for various sections?

Mr. Arrowsmith: It seems to me that that is going too far from this proposition.

Court: That is irrelevant—it doesn't make any difference what those messages were about. You can ask him how many messages he handled.

Q. And death messages? The Court is entitled to know and I have every right to ask him how many death and sickness messages he handled. He said he had an abnormal amount of sickness and death messages.

Court: Find out how many he regards as abnormal.

Q. Go ahead—how many?

A. I should say we handled out of Charleston originating and destined to Charleston six to eight hundred messages a day at that time. We handled on an average of 1,800 to 2,000 messages a day. At this time we handled six to eight hundred death messages a day. We do not handle 1,800 death messages a day. The usual volume of death messages a day doesn't average more than fifteen or twenty I should say, so the difference between the two particular dates is the difference between 15 and 20 and 600 or 800—pertaining to sickness and death. That is what I meant when I said I had an abnormal

amount of messages and half of the messages handled were relating to sickness or death. That condition prevailed there from the latter part of September, about the 20th, until the 10th or 15th of November.

42 Q. Do you recall how many of your force or what percentage of them were out on account of it?

Mr. Arrowsmith: I want to find out the dates.

Q. He said the last of September to the 10th of November.

Court: Or the 15th of November.

A. From about the 20th of September until about the 15th or 10th of November.

Q. During that period what percentage of your force actually went out?

A. I don't recall but two cases—two people in the office who didn't have it, myself and one other clerk.

These Government messages related to the Southeastern Department, which comprises the entire Southern States, at least from Virginia to the Mississippi River. The headquarters of the Southeastern Department was located in Charleston. We were handling these sickness and death messages for that department with reference to the army camps of the Southeastern Division. I had to leave my desk entirely and give my entire time over to serving customers at the counter sending these telegrams, and I was not at my desk more than two or three days during the whole time.

Whether a wire from Johnsonville to Charleston would be handled by an operator to be assigned to that line would be controlled by the movement of business. If we had sufficient number of telegrams over it to require an operator on the wire, he would be there. We would assign one person to one wire, but on account of shortage of operators during this period, we were combining several lines and putting them on one operator, that is, one operator would cover more than one wire. That operator would cover more wires than the operator would under normal times.

With reference to the delivery service, when normal we send out messages one and two on a trip, but during this time we would

43 make up message routes, something in the nature of mail routes and we would send them out anywhere from ten to twenty-five or fifty by one boy to make the best time he could and cover the delivery of telegrams with the least possible delay, and often it was impossible to deliver them promptly. We couldn't get the messengers to distribute them as promptly as we had done before.

Around the first of October, I printed with my own hands and placed a placard over our counter that all telegrams were being accepted subject to delays on account of sickness.

Court: When did you do that?

A. Around the first of October, and it stayed there until the middle of November.

Q. Mr. Gaffney, look at that message and state what is the filing time at Johnsonville?

A. 1:24 p. m., October the 3rd.

Q. What is the receiving time?
A. 3:30 p. m.
Court: What message was that?
A. October the 3rd, the last one.
Q. Please explain to the jury how the delay in handling a message like that could occur during this period of congestion on account of the influenza that you spoke about.
A. It is very probable that between these hours—1:24 and 3:30 p. m., if not taking a good portion of the time, I had the operator that should cover this wire normally on some other wire handling a larger amount of business than this wire.
Q. The same condition that you spoke of there and have one operator covering three or four wires, which the operator wouldn't do in normal times?
A. That's it.

Cross-examination.

By Mr. Arrowsmith:

I undertook the managership of the Charleston office February two years ago. During that time I kept very strict record of the
44 business of my office; have a regular set of books showing what money I took in and paid out and to whom. It is entirely possible from those books to show what operator was on duty on the 3rd of October and what operators stayed in. Those books are in Charleston. I didn't bring them because I was not instructed to do it.
Q. I don't blame you for that, that's all right. Now, you also had a way of showing to the Court how many messenger boys were off duty?
A. We had.
Q. That you had employed—how many you had off duty?
A. Yes, sir.
Q. And how many got paid for that day?
A. It will show how many we had on, but won't how many off.
Q. Wouldn't it show how many off?
A. The messenger boys are paid by the piece.
Q. Don't have any record showing how many working for you?
A. Yes, sir.
Q. If they do work, that shows it?
A. No, sir, that don't.
Q. You could show the number you had?
A. Yes, sir.
Q. And show whether sufficient to have handled the business?
A. Yes, sir.
Q. Where is that book?
A. Charleston.
Q. For the same reason?
A. Yes, sir. The City of Charleston has a Department of Health, and Dr. Mercer Green is at the head of it. I judge he is the man to whom the reports of influenza were made. I am not connected with that department. As a citizen of Charleston, I know that Dr. Green

is at the head of that department. No effort was made through me to bring Dr. Green here to testify as to the pandemic or epidemic. It was not my duty to do so. I am in charge of the Company's business in Charleston, but not compiling evidence in a case. The other clerk in my office who was not afflicted with influenza was a little telephone operator.

45 Q. Miss Smoak testified this morning that she had likely remained?

A. I said telephone operator. I said clerks.

Q. Clerks don't have anything to do with the transmission or delivery of telegrams.

A. They have all to do with the telegrams. They had to phone practically all.

Q. Why didn't you phone Mr. Ravenel?

A. We delivered the nearby telegrams and phoned the long trips.

Q. Now as a matter of fact, you had the same trouble with your messenger boys all through July that you had in October, didn't you?

A. Oh, we haven't had a full messenger force since the war started.

Q. Since Mason & Hanger started down there?

A. No, sir.

Q. Why did you say your short force was due to the act of God?

A. The prevalence of the epidemic I say. A good many messengers were absent on that account.

Q. As a matter of fact, a great many messengers didn't report for duty at all after Mason & Hanger came there?

A. They left our employ.

Q. And you have been having trouble in delivering your telegrams ever since, and are having it now?

A. Not as bad now.

Q. Mason & Hanger are not employing so many men?

Court: When did the difficulty start in the delivery service?

A. When the Government operations began and had developed around and started construction work.

Q. When was that?

A. A year before that time.

Q. As a matter of fact the scarcity was not due to influenza, but had prevailed a year or more before this time?

A. The scarcity and the conditions were intensified by that. I known in Charleston in the last days of September that conditions were acute in my office. I did not notify any office accepting messages for my office of the conditions there. It was not my business to do that. It was somebody's business connected with the Western Union.

46 Q. And that was not done?

A. Yes, sir. The notice I posted over the counter was in response to a notice sent out by the Superintendent's headquarters.

Q. You would not expect Mr. Poston to take notice of the fact that you had a hand printed thing in your office?

A. If the operator at Johnsonville had posted the same notice I did and stuck it up——

Q. Where is the operator at Johnsonville?

A. I don't know where he is.
Q. You know him, don't you?
A. No, sir, I don't know him. I never saw him
Q Do you know how you got this message from Mr. Ravenel?
A. How who got it?
Q. Your office?
A. I imagine the telegram itself would show.
Q. Take the telegram, will you, and look at it?
A. I couldn't tell whether or not brought in by a messenger, but should be able to tell from the record on it.
Q. It is the one marked "rush?" The message from Mr. Ravenel to Mr. Poston?
A. This telegram bears no messenger number or mark, evidently handed in over the counter.
Q. You make that statement——
A. If it was, they put a messenger's number on it when brought in by a messenger, and this has none.
Q. Is it possible that could have been an oversight in this case?
A. I suppose anything is possible, but the boy that made the trip would not have gotten paid unless he had his number.
Q. On this occasion they could overlook a little thing like signing a telegram or putting that on it?
A. That is the case very often as compared with the amount of business we handle.
Q. I am very glad to hear you say that. You have a record
47 to show how many death and sick messages were handled?
A. No, sir, not now. The messages would not be kept there. We don't keep a separate record showing the death messages. We keep copies of the telegrams themselves, but don't compare them with the daily volume of business handled.
Q. How many of those telegrams did you actually handle, that is, how many hours a day were you there in the office?
A. From eight in the morning until anywhere from seven to ten o'clock at night.
Q. Often there all night?
A. No, sir, we closed at one o'clock.
Q. Why is it with this abnormal amount of business you didn't keep open during the night time?
A. You can't effect delivery of messages with any degree of satisfaction after midnight.
Q. Notwithstanding the unusual and abnormal business?
A. Most of our offices close and incoming messages stop coming except from large points.
Q. This first message was taken at Johnsonville at 12:20, and at 12:23 you had finished receiving it at Charleston, that is a fact?
A. I think that is my recollection.
Q. 12:23, that was on October the 2nd?
A. Yes, sir.
Q. Now, on October the 2nd, the operator working the wire from Johnsonville to Charleston was not affected with influenza?
A. Evidently not.

Q. Now, this message was received in Charleston at 5:03 p. m.—I want to know who handled that message?

A. I can't state as to that.

Q. Why not?

A. That was handled by the Johnsonville office and not Charleston.

Q. This was made in Johnsonville. Haven't you got the message made in Charleston?

A. Yes, sir.

Q. Look at that please, sir, and tell me who sent that?

A. How does that message read?

48 Q. "Can sell 200 bales at 32½ cents."

A. The Charleston operator that handled this message is not here. Her initials are E. V.

Court: Who was that?

A. That was the young lady that is sick and could not be here today.

Q. Where is she?

A. She reported sick yesterday.

Q. She lives in Charleston?

A. Yes, sir.

Q. Do you know whether she had influenza on the 2nd or 3rd of October?

A. I couldn't state from memory.

Q. Couldn't state from memory?

A. No, sir.

Q. You had an opportunity to bring that information and didn't do it?

A. It never occurred to me. I only brought what I was instructed to bring.

Q. I am not suing you, but am suing the Western Union Telegraph?

A. I didn't intend getting hold of any record——

Q. This message received at Charleston 5:03 was not received in Johnsonville until 11:30 the next day, that is a fact, and the lady that sent it didn't have the influenza?

A. I couldn't state as to that.

Q. You have stated already that she didn't have influenza?

A. Not that message.

Q. Did you hear Mr. Poston testify that the agent at Johnsonville did not have any influenza at that time?

A. Yes, sir; I heard him say that.

Q. Why was the delay?

A. The record here shows they had wire trouble.

Q. In addition to that, you had your office terribly disorganized because of the fact you were remodeling the office?

A. We were making repairs in order to handle the large amount of business.

Q. And necessarily that created a considerable amount of confusion?

A. Created some of that. We were making provision for handling the normal amount of business without undue delay.

49 Q. You knew, of course, the hours of the Cotton Exchange?

A. Yes, sir.

Q. And you knew, of course, the fluctuations of the cotton market?

A. I was not interested directly in that.

Q. You knew that the cotton was going up and down at all times, not only at that time, but handled the C & D reports over that wire?

A. I never see the quotation at all.

Q. Somebody in your office sees it?

A. Yes, sir.

Q. And they knew the fluctuations of the cotton market?

A. I suppose they did.

Q. And somebody in your office saw this message with the word "rush" printed on the bottom?

A. That was put on the bottom of the message.

Q. That was an indication to emphasize the importance of it?

A. Yes, sir.

Q. And they saw that, notwithstanding which they kept it in your office from five o'clock to ten the next day?

A. That was on the day that they reported wire trouble.

Mr. Davis: I have the papers of the 2nd, 3rd and 5th of October, showing the influenza condition—three papers published in Charleston, and Mr. Poston says he took the News and Courier and it seems to me that is notice.

Mr. Arrowsmith: Counsel has been objecting to my using the quotion——

Mr. Davis: You had not all the papers——

Court: Are you offering the papers?

Mr. Davis: Yes, sir.

Mr. Arrowsmith: We object.

Court: That doesn't show the state of health in Charleston.

Mr. Arrowsmith: Let me see what you have from the News and Courier of October the 2nd.

Mr. Davis: I have the Evening Post of the 2nd.

50 Mr. Arrowsmith: I don't care about that. I want to see what you have about October the 2nd.

Mr. Davis: All right (Reading): "Influenza cases must be reported."

Mr. Arrowsmith: I object to that particular item because it doesn't deal with the conditions in Charleston and that is based upon the reports issued by the United States Public Health Service from Washington.

Court: I don't think that is competent.

Mr. Davis: I think the allegation of the answer that the whole of the United States was in the grip of an epidemic or deadly disease——

Court: The whole of it?

Mr. Davis: Yes, sir. I offer it.

Court: I don't think the newspaper is competent.

Mr. Davis: The defendant offers copies of the News and Courier of October the 2nd and 3rd, 1918, the plaintiff having testified that

he took this paper at that time—the object of this testimony being to bring home to Poston the prevalence of the influenza epidemic in the City of Charleston.

Mr. Arrowsmith: We object upon the ground that nothing therein contained has any tendency to show any epidemic condition in Charleston, and on the further ground that the newspaper is not the proper way to show the said condition.

Mr. Davis: The defense closes.

Reply.

S. B. POSTON recalled.

Examination by Mr. Arrowsmith:

Q. I want to ask you if you have made a calculation of the number of pounds and how many pounds there were?

51 A. Yes, sir. I made a mistake awhile ago and have recalculated—103,210 pounds.

Q. You said this morning the 200 bales were 40,000 pounds?

A. Yes, sir; that is a mistake in calculation.

Court: How much do you say now?

A. 103,210—a little over 500 pounds average to the bale.

No cross-examination.

W. B. RAVENEL recalled.

Examination by Mr. Arrowsmith:

Q. How did you deliver this message to the Western Union? Was it carried to the office or sent for by a boy?

A. My recollection is that we telephoned for a boy to come for it.

Cross-examination.

By Mr. Davis:

I cannot swear that I did. That is only based on my recollection. That was always our custom—to telephone for a boy. We have a call box in our office and we ring that call box for a boy, and in case he doesn't come, we phone for him. I am basing that on the usual custom. I may not have done that this time—yes, sir, but that is the thing I can't tell you now. It has passed out of my recollection. We have got a call box for the Western Union to ring for a boy, and during that time if any of them come in for a telegram and not have much delay about delivering messages—we have some very nice customers down there, Mr. Davis, and one of the conveniences we have is to have a call box to the Western Union in our office, but sometimes that doesn't work and we use the telephone, but we receive and send messages principally by the boy.

Q. I don't want to be bound by the custom.

52 EXHIBIT A.

"Received at 145 East Bay St., Charleston, S. C.
3j MS 11 Collect.

Johnsonville, S. C., 12:20 P. M., Oct. 2, 1918.

W. B. Ravenell and Co. C19
Charleston, S. C.

Wire best offer you can get two hundred bales cotton.

S. B. POSTON.
1223 P. M."

(Rec'd 4 p. m.—Mr. Ravenel's notation.)

EXHIBIT B.

"Received at Johnsonville, S. C.

2CN—23—Charleston, S. C., 503P. 10/2/18.

S. B. Poston, Johnsonville, S. C.

Can sell Two Hundred Bales Thirty Two one half cents basis middling landed Charleston provided all this year's crop subject to prompt reply.

W. B. RAVENEL & CO.
1130A 10/3"

EXHIBIT C.

"Received at 145 East Bay St., Charleston, S. C.
Collect.
3JEV 16

Johnsonville, S. C., 124 P. M., Oct. 3, 1918.
758

W. B. Ravenel and Co.,
Charleston, S. C.

Your wire sell Two Hundred Bales which you have, balance being shipped today and tomorrow.

S. B. POSTON.
330 P.

(Rec'd 4:40 p. m. 10/3/18.) Our telegram 2nd."

(Mr. Ravenel's notation.)

53 EXHIBIT D.

"Charleston, S. C., Oct. 2, 1918.

S. B. Poston,
Johnsonville, S. C.

Can sell two hundred bales thirty two one half cents basis middling landed Charleston provided all this year's crop. Subject to prompt reply.

W. B. RAVENEL & CO.
Rush."

Charge W. B. Ravenel & Co.

EXHIBIT No. 2.

(Possession and Control of Telegraph and Telephone Systems.)

By the President of the United States of America.

A Proclamation.

Whereas the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives, bearing date July 16, 1918, resolved:

That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided

54 That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by Section 24, Paragraph 20, and Section 145 of the Judicial Code: Provided further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may effect the transmission of government communications, or the issue of stocks and bonds by such system or systems.

And whereas it is deemed necessary for the national security and defense to supervise and to take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable:

Now, Therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.

It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster
55 General, Albert S. Burleson. Said Postmaster General may perform the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as *she* shall determine, through the owners, managers, boards of directors, receivers, officers and employees of said telegraph and telephone systems.

Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers, and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be.

Regular dividends hitherto declared, and maturing interest upon bonds, debentures, and other obligations, may be paid in due course; and such regular dividends and interest ma*n* continue to be paid until and unless the said Postmaster General shall, from time to time, otherwise by general or special orders determine; and, subject to the approval of said Postmaster General, the various telegraph and telephone systems may determine upon and arrange for the renewal and extension of maturing obligations.

By subsequent order of said Postmaster General supervision, possession, control, or operation, may be relinquished in whole or in part to the owners thereof of any telegraph or telephone system or any part thereof supervision, possession, control, or operation of which *he* is hereby assumed or which may be subsequently assumed in whole or in part hereunder.

From and after 12 o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall *be* conclusively be deemed within the
56 possession and control and under the supervision of said Postmaster General without further act or notice.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done by the President, in the District of Columbia, this 22nd day of July, in the year of our Lord one thousand nine hundred and

eighteen, and of the independence of the United States the one hundred and forty-third.

[SEAL.] WOODROW WILSON.

By the President:
FRANK L. POLK,
Acting Secretary of State.

(No. 1466.)

EXHIBIT No. 3.

Postoffice Department.

Washington, August 1, 1918.

Order No. 1783.

Pursuant to the proclamation of the President of the United States I have assumed possession, control and supervision of the telegraph and telephone systems of the United States. This proclamation has already been published and the officers, operators and employees of the various telegraph and telephone companies are acquainted with its terms.

Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. Regular dividends heretofore declared and maturing interest on bonds, debentures and other obligations may be
57 paid in due course and the companies may renew or extend their maturing obligations unless otherwise ordered by the Postmaster General. All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment. Should any officer, operator or employee desire to leave the service he should give notice as heretofore to the proper officer so that there may be no interruption or impairment of the service to the public.

I earnestly request the loyal cooperation of all officers, operators and employees, and the public, in order that the service rendered shall not only be maintained at a high standard but improved wherever possible. It is the purpose to coordinate and unify these services so that they may be operated as a national system with due regard to the interests of the public and the owners of the properties.

No changes will be made until after the most careful consideration of all the facts. When deemed advisable to make changes due announcement will be made.

A. S. BURLESON,
Postmaster General.

EXHIBIT No. 4.

Postoffice Department.

Washington, October 9, 1918.

Order No. 2114.

The proposal of the Western Union Telegraph Company, dated October 9, 1918, with respect to just compensation for the use of the properties owned by them during the period of Federal con-
58 trol provided for in the Joint Resolution of Congress approved July 16, 1918, and the proclamation of the President with respect thereto dated July 22, 1918, and the order of the Postmaster General assuming supervision, possession, control and operation of this and other telephone and telegraph companies, dated August 1, 1918, is hereby accepted on behalf of the United States, and compensation will be paid in accordance with the terms and provisions thereof.

(Signed) A. S. BURLESON,
Postmaster General.

The Western Union Telegraph Company, hereafter referred to as owner, hereby offers to accept a just compensation for the supervision, possession, control and operation of the telegraph system of the owner taken by the President of the United States under a joint resolution of the Senate and House of Representatives, dated July 16, 1918, which supervision, possession, control and operation commenced at twelve (12) o'clock midnight on the 31st day of July, 1918, and is referred to as Federal control, to be fixed as follows:

Section 1. The owner's telegraph system of which the President has taken such supervision, possession, control and operation includes:

(*a*) All of the telegraph property operated by the owner as parts of its telegraph system, whether owned, leased or controlled, and all additions, including those through consolidations and purchases made thereto during the period of Federal control, being its system of land lines and articulated cables forming a component part thereof within the jurisdiction of the United States.

(*b*) All materials and supplies on hand at midnight July 31, 1918, pertaining to such landline system. As soon as prac-
59 ticable a separate inventory of said materials and supplies shall be made and authenticated for him by the signature of such persons as the Postmaster General may designate for that purpose, and for the owner by the signature of the president or a vice president of the owner, which inventory when so authenticated shall constitute a part of the proposal.

(c) The net balance as of midnight July 31, 1918, in the accounts shown on the books of the owner and under the uniform system of accounts for landline system telegraph companies prescribed by the Interstate Commerce Commission as follows: (1) number 108, employees' working funds, (2) number 111, due from customers and agents, (3) number 112, accounts, receivable from system corporations, (4) number 113, miscellaneous accounts receivable, (5) number 116, other current assets, (6) number 107, special deposits.

(d) Three million ($3,000,000) dollars in cash for working capital, the use of which the Postmaster General is to have during the period of Federal control without interest, which amount is the amount of working capital which the owner had on hand August 1, 1918, attributable to such landline system.

Section 2. During the period of Federal control, the operation of the property of the owner shall be continued at a standard of efficiency relatively equal to that of the past.

Section 3. (a) During the period of Federal control, through current repairs, maintenance and reconstruction, the property of the owner shall be maintained by the Postmaster General up to a standard relatively equal to that existing on July 31, 1918, so that its state of repair and operating condition will be relatively the same at the expiration of the period of Federal control as at its beginning.

(b) In order to make the provision for depreciation and obsolescence relatively equal to that of the past, during the period of Federal control the Postmaster General shall set aside in each year (and at the same rate for each fraction of a year) the sum of four million ($4,000,000.00) dollars and an amount equal to 2½ per centum of the cost of each addition to the property of the owner during the period of Federal control including additions made through consolidations and purchases. It is understood that the owner of the property has at the present a large number of operating contracts in existence with various railroads in the United States which provide generally, that the latter shall perform certain services in connection with repairs and renewals of the telegraph property in exchange for telegraph service rendered, and if for any reason during Federal control such contracts are terminated or amended without the consent of the owner in such a manner as substantially to affect such services rendered by the railroad companies so as to diminish the value of such services rendered to the telegraph company, then the Postmaster General shall correspondingly increase the amount set aside each year for maintenance, depreciation and obsolescence as to reimburse the telegraph company for such diminished service.

(c) The Postmaster General shall further make provision for the amortization of intangible capital, right of way and land and debt discount, including additions to these accounts because of additions as aforesaid to the property during the period of Federal

control upon a basis substantially equal to the established practice of the owner prior to Federal control.

(*d*) The amounts so set aside shall be credited in monthly
61 installments in accordance with the present established practice of the owner.

(*e*) The charges affecting construction, maintenance, depreciation, reserves for accrued depreciation and amortization of landed and intangible capital and for the amortization of debt discount shall during Federal control be made according to the system of accounts prescribed by the commission.

(*f*) The reserves for amortization of intangible capital, for right of way and land and for the amortization of debt discount, set up as aforesaid together with any balance remaining in the depreciation reserve (set up and created as aforesaid) shall first be expended by the Postmaster General for additions, approved by the owner, to the property as and to the extent needed. If such expenditure does not absorb all said reserves and balance, then the Postmaster General may divert and use such remaining portion for such purpose, in connection with the development of the company's such landline property, as he sees fit and the United States shall thereupon and thereby become obligated to pay an amount equal to the sum so diverted and used, to the owner at the end of the period of Federal control, without interest, subject to the provisions of the last clause of Section 6, Clause (*a*).

Section 4. The owner shall have the right to inspect its property at all times during the period of Federal control and the Postmaster General shall provide reasonable opportunities for such inspection, but such inspection shall not interfere with the operation of the property.

Section 5. (*a*) During the period of Federal control, the owner's plan of practice for compensating employees on account of injury, disability and death and likewise its pension plan, shall be continued, except as modified by mutual agreement by the owner and the Postmaster General. The Postmaster General shall pay
62 all installments or pensions granted prior to August 1, 1918.

(*b*) The owner shall, before they become delinquent, pay all taxes, license fees and charges, and the expense of suits in respect thereof which can or may lawfully be imposed during the period of Federal control by Federal or other governmental authority upon any part of the property described in Paragraph (*a*) of Section 1 hereof, and also such other taxes, license fees and charges as during the period of Federal control become the obligations of the owner.

(*c*) The owner shall render bills to the Postmaster General for such taxes, license fees and charges and operating expenses incident thereto as the same are paid, which bills shall be accompanied by receipts of the proper tax collecting officials, and shall be paid by

the Postmaster General within five days after their rendition, except that said bills shall not include and the Postmaster General shall not pay to the owner, the portion of such taxes, license fees and charges properly apportionable to property not taken under Federal control and to the revenue from said last mentioned property.

(*d*) If any such tax, license fee or charge is for a period which began before July 31, 1918, or continues beyond the period of Federal control, such portion of such tax, license fee or charge as may be apportionable to the period of Federal control shall be paid by the Postmaster General and the remainder shall be paid by the owner.

Whenever a period for which a tax, license fee or charge is imposed cannot be definitely determined, so much of such charge as is payable in any calendar year shall be treated as imposed for such year.

(*e*) During the period of Federal control, the Postmaster
63 General shall pay all rentals for property, guaranteed interest, guaranteed dividends and contract payments for property used in the operation of the property of the owner as per schedule attached.

(*f*) Said taxes and rentals shall be allocated between the expenses of operation and capital accounts in accordance with the accounting rules prescribed by the commission.

Section 6. (*a*) For the use of the Postmaster General the owner shall, out of the compensation hereafter mentioned to be paid by the Postmaster General for the use of said property, loan to the United States from time to time upon reasonable notice during the period of Federal control, without interest, the sum of One Million Dollars ($1,000,000.00) per annum to be used by the Postmaster General in additions and extensions of the owner's property. Such proposed additions and extensions shall be submitted to the owner for approval or disapproval in writing. If approved then such extension or addition upon completion shall be a discharge of the Postmaster General to the amount of the cost thereof to repay to the owner such part of said loan. If such extension or addition is disapproved by the owner then the Postmaster General may if he so desires proceed to make the addition or extension, and at the termination of Federal control, the Interstate Commerce Commission if the parties then disagree shall determine the value to the owner of such added facilities or extensions, and the sum due to or payable by the owner, as the case may be. Such procedure shall also govern any unexpended portion of the depreciation reserve herein provided. The word additions shall include additions made by consolidations and purchases.

The title to all such additions made in accordance with the above arrangements shall immediately vest in the owner.

64 (*b*) The cost of any additions and extensions made by the Postmaster General outside of the said million dollar fund and the unexpended portion of depreciation reserve, and agreed to by the owner, and the value of any additions and extensions which the owner may have disapproved, but which the Interstate Commerce Commission has decided shall be charged to the owner, the cost of such additions shall be repaid to the Postmaster General by the owner in twenty (20) equal annual installments; payable one at the expiration of one year after Federal control and one at the end of each year thereafter until all are paid, with interest from the date of the end of Federal control at the rate of five (5%) per cent. per annum, payable annually upon all unpaid balances.

(*c*) The Postmaster General shall render to the owner on the 15th day of each month accurate statements of the cost of all material and labor furnished by him for account of the owner for such construction during the preceding month, which statements shall be based upon and be in accordance with the accounting rules and classifications prescribed for the owner by the commission and in force July 31st, 1918, as from time to time amended.

Section 7. (*a*) The Postmaster General shall pay to the owner for each year and pro rata for each fractional part of a year during the period of Federal control, an amount equal to the sum of the following items: (1) All interest upon the bonds and obligations of the owner outstanding as of July 31, 1918, as per schedule attached, except bills payable. It is agreed that the Postmaster General shall assume all bills payable made subsequent to July 31, 1918, and shall immediately return the collateral pledged in negotiation of such bills. (2) Seven million nine hundred and eighty-five
65 thousand, seventy dollars and eighty-seven cents ($7,985,070.87), less an amount equal to the net income of the owner's office at Havana, Cuba.

Any securities or obligations issued or guaranteed by the owner and purchased by and in the hands of trustees, shall be treated as outstanding in the hands of the public.

It is hereby provided, however, that the owner shall not declare and pay to its stockholders any dividends in excess of seven (7%) per cent. annually during the period of Federal control.

(*b*) The amounts provided for under subdivision (*a*) hereof shall be paid to the owner in monthly installments on the last day of each calendar month during the period of Federal control except that installments which have accrued prior to the acceptance of this proposal shall be payable at the date of such acceptance; such payments to the owner to fully satisfy and discharge all claims of the owner on account of the amounts so paid.

Section 8. (*a*) All amounts received by the Postmaster General under Paragraphs (*a*) and (*c*) of Section 1 hereof, and all other amounts, whether received from the owner in cash or collected or realized by him from prepayments and current operating assets be-

longing to the owner or arising from telegraph operations prior to midnight of July 31, 1918, shall be credited by him to the owner and the Postmaster General shall, to the extent of the cash so received or realized, pay and charge to the owner all expenses arising out of its telegraph operation prior to August 1, 1918, and unless objected to by the owner, may pay and charge to such owner any of such expenses in excess of the cash so received or realized. Balances of the above accounts shall be struck monthly as of the last day of August, 1918, and as of the last day of each calendar month
66 thereafter, within fifteen days, and the cash balance found on such adjustments to be due either party shall be then payable within five days.

(*b*) Telegraph operating expenses, rent, contract payment deductions shall be allocated with reference to the time when incurred as between the periods prior and subsequent to midnight of July 31, 1918, and between the period of Federal control and the period subsequent thereto, in each instance in accordance with the present established accrual practices of the owner, telegraph operating revenues and rent revenues shall be allocated as between the periods prior and subsequent to midnight of July 31, 1918, and as between the period of Federal control and the period subsequent thereto, in each instance in accordance with the present established accrual practices of the owner.

(*c*) Items included in the accounts (1) number 121 prepaid rents, (2) number 122, prepaid taxes, (3) number 123, prepaid insurance, (4) number 124, other prepayments, as prescribed by the commission, shall be allocated as between the periods prior and subsequent to midnight of July 31, 1918, and as between the period of Federal control and subsequent thereto in each instance, in accordance with the present established practices of the owner.

(*d*) There may be used for additions to the owner's property, approved by the Postmaster General, any of the materials and supplies taken over under Paragraph (*b*) of Section 1 hereof, or purchased by him and held for use in connection with such property, insofar as in his judgment this may be done with due regard to his own requirements. Materials and supplies so furnished shall be charged to the owner at inventory prices in the case of those taken over and at cost in the case of those purchased.

(*e*) The Postmaster General shall pay, or save the owner harmless from, all expenses incident to or growing out of the pos-
67 session, operation and use of the property taken over during the period of Federal control. He shall also pay or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of Federal control or anything done or omitted in the possession, operation, use or control of its property during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General or the United States.

(*f*) The Postmaster General shall save the owner harmless from any and all liability, loss or expense resulting from or incident to any claim made against it growing out of anything done or omitted during the period of Federal control in connection with or incident to operation or existing contracts relating to operations, and shall do and perform so far as is requisite during the period of Federal control for the protection of the owner all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or by reason of anything done or omitted thereunder, the forfeiture or loss by the owner of any of its property, rights, ordinance rights, or franchises, or of its connecting or other contracts involving a facility of operation. The Postmaster General shall also save the owner harmless from any and all claims for breach of covenant heretofore entered into by it or by any predecessor in title or interest in any mortgage or other instrument in respect of insurance against losses by fire.

Nothing in this or in the preceding paragraph shall be construed to be an assumption by the Postmaster General of, or to make him liable on, any obligation of the owner to pay a debt secured by a mortgage.

(*g*) In carrying out the provisions of this section, the
68 Postmaster General shall not settle any claim by or against the owner against the objection in writing of the president or any other duly authorized officer of the owner. The conduct of all litigation arising out of such disputed claims or out of operation prior to Federal control shall be in charge of the owner's legal force and the expense thereof shall be paid by the owner, but the Postmaster General shall render to the owner all reasonable assistance in the conduct of such litigation. This paragraph shall not apply to any litigation between the owner and the United States.

(*h*) The owner shall have the right at all reasonable times to inspect the books and accounts kept by the Postmaster General relating to the property of the owner or to the operation thereof, and the Postmaster General shall during the period of Federal control furnish to the owner periodically copies of operating reports after the end of each fiscal year, the statistical data for such year substantially as heretofore compiled.

(*i*) All payments to be made under this proposal which are not paid within five days after due shall draw interest from the date of their maturity until paid at the rate of five per cent. (5%) per annum.

Section 9. At the end of the period of Federal control all the property described in Paragraph (*c*) of Section 1 hereof, and also all additions (including those made by consolidations and purchases) to the property of the owner made during the period of Federal control out of unexpended reserves, out of the proceeds of securities, or otherwise, together with all repairs, renewals, and replacements thereof, shall be returned to the owner in a state of repair and in an

operating condition equivalent to that of the owner's telegraph system of July 31, 1918.

Section 10. (*a*) Inasmuch as the cables of the owner from
69 Key West to Havana have been operated in connection with the landlines directly from New York to Havana without relaying the messages and such cables are to all intents and purposes an integral part of the owner's land line system, the owner reserves the right to retain said cables from Key West to Havana and to maintain its office in the City of Havana and to operate the same as heretofore and will also maintain the cables connecting such office with the office at Key West.

(*b*) The owner operates either through ownership or under lease certain telegraph lines and system in New Foundland, Prince Edward Island and the Maritime Provinces, and also a line to Vancouver. The construction, operation and maintenance of these lines and systems shall continue as heretofore under the direction of the owners, using the supervisory operating staff of the landlines in the United States for that purpose. In the discharge of the duties of construction, operation and maintenance such supervisory employees however, shall be considered as employees of the owner, and they shall be paid by the Postmaster General for the owner's account. Separate account of such operations shall be kept and settled at the end of each month. In settling such accounts the expenses and actual disbursements chargeable to the owner shall be those actually incurred by the Postmaster General on behalf of the owner, and the revenues and interchange of business shall be determined in conformity with the provision of the contract for the interchange of business between the Western Union Telegraph Company and the Canadian Northern Telegraph Company and the Great North Western Telegraph Company dated January 1, 1915, and such provisions of said contract are here referred to and made part of this agreement as if attached hereto. The foregoing arrangement to continue so
70 long as the owner continues obligated to operate the said telegraph lines and systems as above described. It is understood that any or all of these lines and systems may at the option of the owner be disposed of or become a part of the Great Northern Western Telegraph system, and in either event shall be subject to the existing contract now in force between the company and the owner.

(*c*) The owner owns a substantial share in and operates a company known as the American District Telegraph Company of New Jersey, and its controlled companies, doing a general fire alarm, burglar alarm and sprinkler supervisory business throughout the United States. The owner proposes that the present relationship between the landline offices and the American District Telegraph Company shall continue during the period of Federal control. Under existing contracts the American District Telegraph Company of New York and the American District Telegraph Company of New Jersey and controlled companies operate a joint messenger service for the collection and delivery of telegrams and cablegrams. It

proposed by the owner to purchase one or both of the plants and thus do away with existing contract obligations. The owner proposes to furnish the money necessary for acquiring one or both of said plants and the Postmaster General shall pay interest upon such sum or sums at the rate of six per centum (6%) per annum until the expiration of Federal control. Before concluding any contract for the purchase of the plant of the American District of New Jersey the owner shall procure the consent of the Postmaster General.

(*d*) The owner operates under lease a system of Trans-Atlantic cables under separate accounts, part of which system has been for over forty years operated in conjunction and con-jointly with the landline system now taken over by the Postmaster General. In order that the owner shall not suffer loss through the taking over
71 of the landline system the Postmaster General agrees that the owner shall have the right to maintain and operate independently cable offices for receiving and delivering such cable messages in any cities wherever the owner desires to do so. All cable messages collected or delivered from such offices shall be free of any charge by the Postmaster General, and the expense of operating such offices and delivering such messages to be borne solely by the owner. The Postmaster General furthermore agrees to respect all vias attached to outgoing or incoming messages in accordance with the Berne convention. Cable messages filed at landline offices, and not routed by the sender, to be divided between the Western Union cable system, and the Commercial Cable system, upon an equitable basis as the Postmaster General may direct, the compensation to the Postmaster General for the transmission and accounting of such messages shall be in accordance with the zone rates prevailing prior to July 31, 1918. The same compensation shall attach to messages delivered to landlines at the cable termini, to wit: New York or Boston, for transmission and delivery to destination. The Postmaster General agrees to maintain all cable connections and wire facilities incident to handling cable messages as heretofore, the division of revenues and expenses as between cable lines and landlines to be as heretofore.

Section 11. At the end of the period of Federal control the Postmaster General shall return to the owner an equal quantity and quality of materials and supplies of equal relative usefulness to that of the materials and supplies which he received, and to the extent that the Postmaster General does not return such materials and supplies he shall account to the owner for the same at prices prevailing at the end of the period of Federal control. To the extent that the owner may then receive materials and sup-
72 plies in excess of those delivered by it to the Postmaster General, it shall account for the same at the prices prevailing at the end of the period of Federal control, and the balance shall be adjusted in cash.

Section 12. (*a*) At the end of the period of Federal control there shall be paid to the owner an amount of money equal to the cash working capital without interest received by the Postmaster General

from the owner, and also an amount equal to any other cash and special deposits received by him from the owner at the beginning of the period of Federal control and not theretofore accounted for by him, together with any unpaid interest which may have accrued upon the said other cash and deposits under this proposal. There shall be paid to the owner any funds created under the provisions of this agreement, except to the extent that such funds may have been properly used under this proposal.

Section 13. In addition to the items of compensation enumerated in Section 7, the Postmaster General will pay to the owner the annual charge for such interest and dividends as the owner may be required to pay on new securities, obligations or share capital issued for the discharge, conversation or renewal of present obligations, and for additional interest and charges to secure extension of existing securities or obligations.

Section 14. The owner has a new building in the City of Chicago in process of construction. The owner undertakes to complete this building and upon completion to turn it over to the Postmaster General for occupancy and use. The Postmaster General thereupon agrees to vacate the present building in Chicago and thereafter to have no claim to possession or use of such building and to accept the new building in full substitution therefor, without any modification of this proposal in any other particular.

73 Section 15. In presenting this proposal it is understood that only the salient features incident to the relations of the parties have been described and that further details not covered arising from the operation of the property by the Postmaster General shall be settled in conformity with the broad principles herein enunciated.

Section 16. (*a*) In this proposal the words "Postmaster General" are used to designate Albert S. Burleson, or such other person as the President may from time to time appoint to exercise the powers conferred on him by law with reference to Federal control; the word "Commission" is used to designate the Interstate Commerce Commission; the word "additions" as used herein shall be understood to mean additions, betterments or replacements as defined by the commission's system of accounts (including extensions and improvements made through consolidations and purchases), the net cost of which, under such system of accounts, is properly chargeable to fixed capital, that is to say, accounts:

No. 100. Fixed capital installed prior to January 1, 1914.
No. 101. Fixed capital installed since December 31, 1913.
No. 102. Construction work in progress.

(*b*) Whenever reference is made herein to the system of accounts of the commission, it shall be understood to mean the uniform system of accounts and rules for telegraph companies prescribed by the commission as such system existed at midnight July 31, 1918.

(c) Any patents or licenses thereof discoveries, inventions, ideas or devices owned or controlled by the owner may be used by the Postmaster General without charge by the owner during the period of Federal control, but the right to such use shall not extend beyond said period. Nor shall the use of patented devices owned by other individuals or companies, be construed to confer any
74 right upon the owner herein to use or to control the use of such devices subsequent to the termination of Federal control; nor shall the use during the period of Federal control of patented devices covered by patents of the owner on property other than that of the owner be construed to confer the right to continue such use after the termination of such period.

(d) This proposal, if accepted by the Postmaster General, shall be effective on and from midnight July 31, 1918.

Dated this 9th day of October, 1918.

(Signed) THE WESTERN UNION TELEGRAPH COMPANY,
By NEWCOMB CARLTON,
President.

Washington, D. C., October 9, 1918.

Hon. A. S. Burleson, Postmaster General, Washington, D. C.

DEAR SIR:

The term "net income" as employed in Section 7, Paragraph (a) of proposal submitted herewith is intended to include all earnings of the Havana office less fixed charges and expenses, of its operation and maintenance and the fixed charges and expense of the maintenance and operation of its cables and connecting lines between the Havana office and Key West office. It is also intended that standard rates of charge for cable ship when required and cable materials shall be charged in said accounts.

Respectfully yours,
(Signed) NEWCOMB CARLTON,
President.

O. K.
(Signed) J. C. KOONS,
Acting P. M. G.

October 9, 1918.

The foregoing constitutes all of the evidence in the case.

75 *Motion for a Directed Verdict.*

Mr. Davis: We move for a directed verdict in favor of the defendant on the following grounds:

1. In that at the times that the messages involved in this suit were filed for transmission and delivery and the cause of action accrued,

the defendant was not engaged in the business of operating its telegraph system, but that said system was, and still is, being operated solely by the Government of the United States under the direction of the Postmaster General of the United States, and to permit this suit to be maintained against this defendant would deprive it of its property without due process of law and would deny to it the equal protection of the laws in violation of the fifth and fourteenth amendments to the Federal Constitution.

2. In that at the times that the messages involved in this suit were filed for transmission and delivery and the cause of action accrued, the defendant was not engaged in the business of operating its telegraph system but that said system was, and still is, being operated solely by the Government of the United States under the direction of the Postmaster General of the United States, pursuant to the joint resolution of the Congress of the United States, and that to hold the defendant liable for damages in this case would be in violation of and in contravention to the provisions of Article 1, Section 8, Subdivision 12 of the Constitution of the United States, empowering Congress to raise and support armies, of Article 1, Section 8, Subdivision 7 of the Constitution of the United States, empowering Congress to establish post offices and post roads, and of Article 1, Section 8, Subdivision 18 of the Constitution of the United States, empowering Congress "to make all laws which shall be necessary and
76 proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof," and in violation of and in contravention to the Acts and Joint Resolution of the Congress of the United States passed pursuant to the foregoing powers and especially the aforesaid Joint Resolution of July 16, 1918.

3. In that the delay in transmitting and delivering the telegrams involved in the suit, if there was any delay, was due not to any negligence on the part of the defendant, but entirely to an act of God, to-wit, the prevalence of an epidemic of a deadly disease.

4. In that there is no evidence in the case of any negligence on the part of the defendant as the proximate cause of the injury to the plaintiff.

5. In that the entire evidence shows that the injuries sustained by the plaintiff, if he sustained any at all, was due solely to the act of his cotton factor in Charleston, South Carolina.

The Court: I think the Government has taken possession of the operation, but have done it as agents of these companies, and undertaken to indemnify all these companies on all claims arising out of causes of action which might arise to anybody from the operation of the company during the period of its operation through the Government agency, so that it does not affect the ultimate liability of the Telegraph Company as operating under the charter from the State of South Carolina, but is a common carrier and is bound to

the obligation of a common carrier and cannot divest itself of those obligations; at the same time, it goes on and exercises the powers of its charter and getting the income, and therefore it has to bear its burden. I will have to overrule the motion and let it go to the jury.

77 *Charge.*

Mr. Foreman and Gentlemen of the Jury:

This is an action brought by the plaintiff, S. B. Poston, against the Western Union Telegraph Company, in which the plaintiff seeks to recover certain damages which he claims he has sustained by reason of the negligence of the defendant telegraph company in handling and delaying the delivery of certain telegrams mentioned in the complaint, which he says he sent over the lines of the defendant company from Poston, S. C., to Charleston, S. C., and telegrams which were sent to him from Charleston, S. C., to Poston, S. C.

The defendant comes into court and admits that it does own a telegraph line—did I say Poston? It is Johnsonville, instead of between Poston and Charleston it is Johnsonville and Charleston, S. C.; somehow I got the name Poston associated with the plaintiff's firm. I don't know who they were, but that was the name of the plaintiff.

The defendant admits that it owns this telegraph line, but it says—and that it was engaged in doing the business of a common carrier of intelligence for hire between the two points mentioned in the complaint; and it admits that the telegram or telegrams similar to those mentioned in the complaint were delivered to it for transportation, and were transported over its wires; but it sets up as a defense that it was not at that time operating this line of telegraph wires, but that the wires and telegraph plant was being operated by the government agents under the direction of the Postmaster General, and for that reason the defendant asks that the complaint be dismissed.

Under the view that I take of the law, the mere operation of a telegraph line belonging to the defendant by the governmental agents under the direction of the Postmaster General would not re-
78 lieve the defendant as a common carrier of intelligence for hire for the failure to discharge its duty as such common carrier with respect to messages delivered to it for transmission over its line, and therefore, you are to consider this case just as though the agent operating the telegraph lines of the defendant company was agent of the defendant company.

Now the telegraph company is a common carrier of intelligence for hire and owes to the public the duty to use diligence in the transmission and delivery of messages, and where a person is injured by the failure of the telegraph company to perform its duty with reference to messages which he has delivered to the telegraph company to transmit over its lines or which are sent to him for his benefit over the line of the defendant company, and this failure of the telegraph company to perform its duty was due to negligence on

its part, then in such case the telegraph company would be responsible to the person injured for the resulting damages. The law imposes upon the telegraph company the duty to receive and transmit messages with promptness and reasonable diligence, and in determining whether or not they were negligent in failing to perform their duty, you are to be governed by what would be required of them in the exercise of ordinary care.

The action is based on negligence, and negligence is the failure to exercise and use ordinary care that would be used by an ordinary person—or a person of ordinary prudence under the circumstances of the occasion.

Now if the telegraph company is negligence in the performance of its duty, and a person is injured as a proximate result of such negligence, the person injured would be entitled to recover the actual damages thereby occasioned to him, and the rule of damages is stated as follows: Now I am not reading exactly, but I will change it as I go along: A telegraph company is liable for damages that are
79 the natural and proximate results of its negligence to successfully deliver a message received by it for transmission and delivery. Damages are a natural result when they are such as usually follow in the ordinary course of things, and they are the proximate result when they result directly or remotely from the alleged cause. Such damages are recoverable because they are supposed to be within the contemplation of the parties when they contract. If a telegram making an offer of a price is sent, and the sale is to be made by an acceptance of that offer promptly, and if the message is sent over a telegraph line by the telegraph company to accept the offer and thereby make a sale by a meeting of the minds of the two parties, a proposed contract of sale, and through the negligence of the telegraph company, the message of acceptance is delayed—is negligently delayed beyond a reasonable time and delivered after the time limited for its acceptance by the party making the offer, and the party who accepted the offer to sell by sending the telegram has been damaged by reason of failing to get the telegram to the party making the offer in time to complete the sale, then the measure of his damages—the measure of the damages of the person who was hereby prevented from disposing of his goods would be the difference between the price at which he could have disposed of his goods under such offer, if he could have disposed of them under the offer, and the market price of the same goods at the time the message was actually delivered or should have been delivered, and he has the opportunity to dispose of them. And the market value is what price he could have obtained in open market on fair competition and where parties are dealing with reference to market prices in a particular point, reference must be had to the market price of that particular point, and if there is no market price at that particular place, then at any other convenient market for the goods which the party has
80 for sale where there was at the time a market price, and when transportation and other expenses would be necessarily incurred in getting the goods to a convenient market where there was no market at the place where the goods were had for sale, then those

expenses which are shown to have been actually necessary to put the goods on the market could be taken into consideration in determining what was the actual damage. If there was no market price at the time that the telegram was delivered and it got there too late to close the contract which it was intended to close, then the party sending the telegram and having the goods for sale should act expeditiously in disposing of the goods as soon as he could reasonably do so. He could not hold them to speculate upon a change of value on the market or on advance in price, but he must act promptly—with reasonable promptness to dispose of the goods, and if he does not do that, then the jury in estimating his damages, must take the market value of the goods at such time as he could under the circumstances of the case have disposed of them. He is not allowed to hold the goods in order to speculate upon changes in the market, but he must act promptly as soon as he finds that his proposed sale for which he had a contract price can't be carried out—as soon as he ascertains that he must act promptly to remedy the situation by putting the goods on the market and get what is the actual market price of the goods at that time. That does not mean necessarily the same day on which the telegram was sent, but it may or may not according to the circumstances surrounding him and the opportunities which he has for making a sale, but does—if he does not make a sale and keeps the goods, then it would be for the jury to say when he could have disposed of them, acting with reasonable promptness, and what price he would have realized upon the market; and
81 when the jury ascertains that reasonable market value or the price at which he could have disposed of the goods on the market, acting promptly, as soon as he knows that the proposed contract sale has been defeated, they will compare that market value with the proposed contract price, and if the market value at which he could have disposed of the goods was less than the proposed contract price at which he could have disposed of the goods, then the measure of his damages would be the difference between the two.

Now the telegraph company owes a duty to a sender of a message delivered to it for transportation to inform the sender promptly of any inability on its part to promptly transmit and deliver the message,if it knows of such inability or has notice of it. When it accepts a message for transmission, if it knows of some circumstances which would prevent the prompt handling of the telegram in the ordinary course of business, then it becomes the duty of the telegraph company to give notice to the sender of such circumstances. If the delivery of a telegram is prevented by the act of God, over which the telegraph company has no control—that is the act of God, and such is the sole cause of the delay or non-delivery of the telegram, and the party sending the telegram or to whom the telegram is sent is injured solely by such act of God or overpowering necessity, and the telegraph company has acted with due care in regard to the matter and has been guilty of no negligence, then the telegraph company would not be responsible for the injury to the party sending the telegram or to whom a telegram was sent.

But if there was an unreasonable delay in the transmission or de-

livery of the telegram, or a failure to deliver the telegram, and such delay or failure to deliver was due to negligence on the part
82 of the telegraph company, then the mere fact that there may have been also present some outside necessity which—or act of God which contributed as one of the causes towards the delay or non-delivery, would not relieve the telegraph company of the liability. But in order to hold the telegraph company liable it must be shown that they were negligent in failing to discharge its duty to promptly transmit and deliver the messages in question, and the burden is upon the plaintiff, the sender of the message, to show negligence on the part of the telegraph company. The mere fact that there was a delay or non-delivery is not sufficient to establish liability, but before liability on the part of the telegraph company can be established, the party injured must go further and show that the injury was due to negligence on the part of the telegraph company.

Now the burden is upon the plaintiff to prove negligence and also to prove that he was injured and the extent of his injury by the preponderance of the evidence, that is the greater weight of the evidence; not necessarily the greater number of witnesses, but by the evidence which carries the greater weight of conviction to your minds. If after hearing all the testimony and considering it, your minds are equally balanced as to whether or not the telegraph company was negligent, or whether or not the plaintiff was injured, why it would be your duty to find against the plaintiff, and in order to find against the defendant—in order for you to find against the defendant, the greater weight of the evidence must be against it. The burden is upon the plaintiff to establish his case by the greater weight of the testimony.

Now if you find that there was negligence on the part of the defendant telegraph company, or its agents or servants, in handling any of the messages mentioned in the complaint, if such mes-
83 sages had been delivered to it for transmission, and that the plaintiff has been injured thereby, then it would be your duty to determine from the evidence how much he has been injured, applying the measure of damages that I have given to you, that is the difference between such contract price as may have been shown in the evidence—if there was any evidence showing a contract price or an agreed price—and the market value of the goods as soon thereafter as he could dispose of them and sell them on the market; so that all those are questions of fact for you to settle, and if you find that the plaintiff has established a case of liability and shown the amount of his damages, then you would indicate that by writing your verdict "We find for the plaintiff—so many—dollars damages," whatever you find his actual damages to be. If on the other hand you find he has failed to make out a case against the telegraph company in any of the particulars that I have charged you necessary to establish liability on their part, then simply say "We find for the defendant," so take the record. I will hand you the complaint and answer.

The jury returned a verdict in favor of the plaintiff, whereupon the defendant noted a motion for a new trial on the same grounds as those

urged in its motion for a directed verdict. This motion was overruled by the presiding judge.

Exceptions.

1. His Honor erred, it is respectfully submitted, in holding that whether at the time alleged in the complaint the Western Union Telegraph Company maintained an office at Johnsonville, S. C., was a question of fact and in permitting the plaintiff, over the objection of the defendant, to testify that the defendant did maintain such
84 an office at Johnsonville on October 2, 1918, and that he delivered to it in such office the telegram introduced in evidence as Exhibit "A," the error being that whether or not the defendant maintained an office at the place and at the time in question was a question of law to be determined under the joint resolution of Congress of July 16, 1918, and the Proclamation of the President of July 22, 1918, and such question of law could not be left to the determination of a jury.

2. His Honor erred, it is respectfully submitted, in refusing to grant defendant's motion for a nonsuit made at the close of the plaintiff's case, for the reason stated in the grounds of said motion, which was as follows: The defendant moves for a nonsuit on the ground that no damage has been proven, the plaintiff's own witness having said that he made no effort to sell the cotton.

3. His Honor erred, it is respectfully submitted, in refusing to allow the defendant to offer in evidence copies of the Charleston News and Courier of October 2nd and 3rd, 1918, for the purpose of bringing home to the plaintiff knowledge of the prevalence of the epidemic of influenza in Charleston at that time, the error being that the plaintiff had testified that he was a subscriber to and a constant reader of such newspaper at that time, and it is submitted that under these conditions the evidence offered was both relevant and competent and the defendant was entitled to have it placed before the jury.

4. His Honor erred, it is respectfully submitted, in refusing to grant defendant's motion for a directed verdict made at the close of the entire case, for the reasons stated in the grounds of said motion, which were as follows:

First. In that at the times that the messages involved in this suit were filed for transmission and delivery and the cause of action accrued, the defendant was not engaged in the business of oper-
85 ating its telegraph system, but that said system was, and still is, being operated solely by the Government of the United States under the direction of the Postmaster General of the United States, and to permit this suit to be maintained against this defendant would deprive it of its property without due process of law and would deny to it the equal protection of the laws in violation of the fifth and fourteenth amendments to the Federal Constitution.

Second: In that at the times that the messages involved in thi suit were filed for transmission and delivery and the cause of actio accrued, the defendant was not engaged in the business of operatin its telegraph system but that said system was, and still is, bein operated solely by the Government of the United States under th direction of the Postmaster General of the United States, pursuan to the joint resolution of the Congress of the United States, and tha to hold the defendant liable for damages in this case would be i violation of and in contravention to the provisions of Article 1, Se tion 8, Subdivision 12 of the Constitution of the United States, em powering Congress to raise and support armies, of Article 1, Sectio 8, Subdivision 7 of the Constitution of the United States, empowe ing Congress to establish postoffices and post roads, and of Ar ticle 1, Section 8, Subdivision 18 of the Constitution of the Unite States, empowering Congress "to make all laws which shall be nece sary and proper for carrying into execution the foregoing powe and all other powers vested by this Constitution in the Governmen of the United States, or in any department or officer thereof," an in violation of and in contravention to the Acts and Joint Resol tions of the Congress of the United States passed pursuant to th foregoing powers and especially the aforesaid joint resolution of Jul 16, 1918.

Third. In that the delay in transmitting and delivering the tel grams involved in the suit, if there was any delay, was du
86 not to any negligence on the part of the defendant, but en tirely to an act of God, to-wit, the prevalence of an epidemi of a deadly disease.

Fourth. In that there is no evidence in the case of any negligen on the part of the defendant as the proximate cause of the injury t the plaintiff.

Fifth. In that the entire evidence shows that the injuries su tained by the plaintiff, if he sustained any at all, was due solely t the act of his cotton factor in Charleston, South Carolina.

5. His Honor erred, it is respectfully submitted, in charging th jury as follows:

"Under the view that I take the law, the mere operation of a tel graph line belonging to the defendant by the governmental agen under the direction of the Postmaster General would not relieve th defendant as a common carrier of intelligence for hire for the failur to discharge its duty as such common carrier with respect to me sages delivered to it for transmission over its line, and therefore, yo are to consider this case just as though the agent operating the tel graph lines of the defendant company were agents of the defendan company.

The charge so given was erroneous and prejudicial for the reaso that at the time this cause of action accrued, complete possession, e clusive control, and the right to all the revenues derived from th operation of the business, of all the lines and properties of the de fendant Western Union Telegraph Company were in the Goverr

ment of the United States as a result of the acts and joint resolution of Congress, the proclamation of the President, and the contract between the government and the company, and the government was in no sense operating the lines and properties as the agent of the company, but solely under and by virtue of its powers of
87 sovereignty, and to hold the defendant liable for such operation would deprive it of its property without due process of law and deny to it the equal protection of the laws in violation of the provisions of the fifth and fourteenth amendments to the Constitution of the United States.

To Messrs. Arrowsmith, Muldrow, Bridges and Hicks, attorneys for respondent:

Please take notice that appellant proposes the foregoing as the Case and Exceptions for appeal to the Supreme Court.

WILLCOX & WILLCOX,
Attorneys for Appellant.

We hereby agree that the foregoing shall constitute the Case and Exceptions for appeal to the Supreme Court in this case and that a printed copy thereof shall be filed as the return wherever the same may be required by law to be filed.

WILLCOX & WILLCOX,
Attorneys for Appellant.
ARROWSMITH, MULDROW, BRIDGES & HICKS,
Attorneys for Respondent.

87½ THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

S. B. POSTON, Plaintiff-Respondent,

against

WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

Opinion:

EUGENE B. GARY, *C. J.:*

The following statement appears in the record:

"This action was commenced in the Court of Common Pleas for Williamsburg County, S. C., on the 17th of November, 1918, by the service of the usual summons and complaint.

"The purpose of the action was to recover damages alleged to have been sustained by the Plaintiff on account of the loss of a sale of two hundred bales of cotton, which loss he alleges was due to delay in delivering certain telegrams, mentioned in the complaint.

The answer alleged for a first defense, in substance, a general denial and a specific denial, that the defendant was operating a telegraph line at the time the cause of action accrued; for a second de-

fense, that under the joint resolution of Congress, the proclamation of the President and the orders of the Postmaster General, the defendant's telegraph line had been taken over by the United States Government, and at the time the cause of action accrued, was being operated exclusively by the Government; and for a third defense, that there was no negligence in the transmission and delivery of the messages, but that the delay, if there was any, was due solely to the prevalence of an epidemic of influenza, which was an act of God

"The case came on for trial before Judge W. H. Townsend, and a jury at the spring term, 1919, of the Court of Common Pleas for Williamsburg County and resulted in a verdict in favor of the plaintiff for $1,548.15. Judgment was duly entered on this ver-
88 dict, and within the required time appellant served notice of its intention to appeal to this court."

The defendant appealed upon exceptions, which it will not be necessary to discuss in detail.

The first question that will be considered is whether there was error in the ruling of his Honor the presiding Judge that the action was properly brought against the defendant, Western Union Telegraph Company.

The appellant's attorneys rely upon the joint resolution of Congress, which was adopted on the 16th of July, 1918; the proclamation of President Wilson on the 22nd of July, 1918; the order made by Postmaster General Burleson, on the 1st of August, 1918; and on the contract between the Western Union Telegraph Company and the Postmaster General, dated the 9th of October, 1918, which were introduced in evidence by the defendant.

The joint resolution of Congress, authorized and empowered the President of the United States to take possession and control of all telegraph systems; and to operate them in such manner as to him might seem needful or desirable. Provided, That just compensation should be made for such supervision, possession, control or operation, to be determined by the President.

In the President's proclamation, he made the following order:

"It is hereby directed that the supervision, possession, control and operation of such telegraph and telephone systems, hereby by me undertaken, shall be exercised by and through the Postmaster General Albert S. Burleson, said Postmaster General may perform the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers and employees of said telegraph and telephone systems. Until and except so far
as said Postmaster General shall, from time to time, by gen-
89 eral or special orders, otherwise provide, the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the name of their respective companies, associations, organizations, owners or managers as the case may be."

The following provisions are in the order, made by the Postmaster General:

"Pursuant to the proclamation of the President of the United States, I have assumed possession, control and supervision of the telegraph and telephone systems of the United States.

Until further notice, the telegraph and telephone companies shall continue operation in the ordinary course of business, through regular channels. All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment."

The following provision is in the contract between the Western Union Telegraph Company and the Postmaster General: "The Postmaster General shall pay, or save the owner harmless from all expenses incident to, or growing out of the possession, operation and use of the property taken over during the period of Federal control. He shall also pay, or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it, by reason of any cause of action arising out of Federal control, or anything done or omitted in the possession, operation, use or control of its property, during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General of the United States."

While the action and the judgment therein recovered are
90 in form against the Western Union Telegraph Company, yet in effect they are against the Postmaster General.

The plaintiff followed the mode of procedure directed by the President in his proclamation and ordered by the Postmaster General, not only in his order hereinbefore mentioned but also when he ratified the contract between the Western Union Telegraph Company and himself, which contemplated a judgment in form against the defendant Western Union Telegraph Company.

As judgments recovered in actions, in form, against the telegraph companies are to be paid by the Postmaster General, it can not be successfully contended that the recovery in this case will deprive the defendant of its property, without due process of law.

We proceed to the consideration of the defense "that there was no negligence in the transmission and delivery of the messages, but that the delay, if there was any, was due solely to the prevalence of an epidemic of influenza, which was an act of God."

The testimony upon this question was contradictory, and therefore was properly submitted to the jury.

The facts of the present case are quite different from those in Castle vs. Ry., 99 S. E. R. 846.

Affirmed.

We concur.

D. E. HYDRICK, *A. J.*
R. C. WATTS, *A. J.*
T. B. FRASER, *A. J.*
GEO. W. GAGE, *A. J.*

Filed January 26, 1920.

HARRY McCAW,
Clerk.

91 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1919.

S. B. POSTON, Respondent,

VERSUS

WESTERN UNION TELEGRAPH COMPANY, Appellant.

Appeal from Williamsburg County.

Hon. W. H. Townsend, Judge.

Petition for Rehearing.

To the Honorable the Justices of the Supreme Court of the State o South Carolina:

Your petitioner, Western Union Telegraph Company, appellan in this case, by its attorneys, respectfully shows:

1. That on January 27, 1920, a final decision was filed by thi Court in said cause, affirming the judgment of the lower court an thereby fixing liability on your petitioner. In reaching this con clusion, your petitioner, by its attorneys, suggests that this cou has overlooked certain material matters of law and of fact bearin on the question of liability in the case and which, if applied to th facts of the case, would result in a reversal of the judgment belo and a dismissal of the complaint.

The reasons given by the Court for holding your petitioner liabl in this case are stated thus:

"While the action and the judgment therein recovered ar
92 in form against the Western Union Telegraph Company yet in effect they are against the Postmaster General.

"The plaintiff followed the mode of procedure directed by th President in his proclamation and ordered by the Postmaster Gen eral, not only in his order hereinbefore mentioned, but also whe he ratified the contract between the Western Union Telegraph Com pany and himself, which contemplated a judgment in form agains the defendant, Western Union Telegraph Company.

"As judgments recovered in actions, in form, against the tele graph companies are to be paid by the Postmaster General, it ca not be successfully contended that the recovery in this case will de prive the defendant of its property, without due process of law."

Since at the time the cause of action set forth in the complaint i alleged to have accrued, the lines of your petitioner were being op erated solely by the Federal Government under a joint resolutio of the Congress of the United States, having the force and effect o a Federal statute, manifestly all questions of liability in this cas must be determined by principles of Federal, rather than of State law. In the conclusions above set forth as the grounds for fixin

liability on the defendant for the acts of the Federal Government, this Court, it is respectfully submitted, has wholly overlooked the principles of Federal law that control the case.

The first ground assigned is that "while the action and the judgment therein recovered are in form against the Western Union Telegraph Company, yet in effect they are against the Postmaster General." If it be conceded that this is a correct statement of the actual situation existing in the case, it would seem clear that under the law as declared by the Supreme Court of the United States in numerous decisions, such a judgment could not be rendered. This statement is a statement to the effect that the Postmaster Gen-
93 eral, who is an official of the United States Government, is the real party in interest and therefore that the judgment is really against him and not against the company, but there can be no judgment rendered that is to be effective against an officer of the United States in any state court unless there is a direct act of Congress authorizing the recovery of such judgment in a state court. This principle has been so often stated and applied by the Federal decisions as to have become almost an axiom of those courts.

Ex parte Ayers, 123 U. S. 443, 31 L. Ed. 216.
International Postal Supply Co. vs. Bruce, 194 U. S. 601, 48 L. Ed. 1134.
Belknap vs. Schild, 161 U. S. 10, 40 L. Ed. 599.
Minnesota vs. Hitchcock, 185 U. S. 373, 46 L. Ed. 954.
Kansas vs. United States, 204 U. S. 331, 51 L. Ed. 510.

There is nothing whatever in the record of this case nor is there a fact outside of the case to show that the Congress of the United States has ever consented that the Postmaster General shall be sued, either directly or indirectly, in any state court, and as said by the Supreme Court of the United States in International Postal Supply Co. vs. Bruce, 194 U. S. 601, 48 L. Ed. 1134, in the absence of a statute, a court has no more authority to maintain an indirect action against the Federal Government or an official thereof than to maintain a direct action. The statute by which the Government took over the railroads authorizes suits and by subsequent general orders, provisions were made as to maintaining these suits against the Director General. No such provision, however, was made as to the telegraph companies and therefore the only right of action against such companies, as they are exclusively in the hands of the United States Government, is that provided by Section 24, Subdivision 20, of the Judicial Code of the United States.

If these principles are applied to the present case, the Court must hold on the above statement of facts as to the force and ef-
94 fect of the judgment that the judgment is a nullity and that the plaintiff is remitted for his rights to the District Court of the United States for the Eastern District of South Carolina or to the Court of Claims at Washington.

2. The Court, in the course of its opinion, further states as a reason for holding the defendant liable in this case that the plaintiff followed the mode of procedure directed by the President in his

proclamation and ordered by the Postmaster General not only in his order but when he ratified the contract. In making this finding, your petitioner deferentially submits, the Court has inadvertently fallen into an error, as there is nothing in the record to sustain such a conclusion. Neither the proclamation of the President nor the order of the Postmaster General has anything whatever to do with the maintenance of a suit and there is nothing therein that contemplates the bringing of a suit. It is true, the contract states that the Postmaster General shall pay or hold the company harmless from all judgments that may be recovered against it, but this is no authority whatever for allowing the recovery of such indirect judgment against the Postmaster General himself in a state court. If the contract could be given such effect, it would have been a wholly ultra vires act on the part of the Postmaster General, as he was without any authority to confer jurisdiction of an action against him on a state court when no act of Congress furnished the authority for his so doing. In other words, jurisdiction of an action against an official of the United States Government must be conferred by an act of Congress and cannot be conferred by the act of an official of the Government.

3. In the trial of the cause in the court below, your petitioner made a motion for a directed verdict in its favor on the ground, among others, that "at the times that the messages involved in this suit were filed for transmission and delivery and the cause of
95 action accrued, the defendant was not engaged in the business of operating its telegraph system, but that said system was, and still is, being operated solely by the Government of the United States under the direction of the Postmaster General of the United States, and to permit this suit to be maintained against this defendant would deprive it of its property without due process of law and would deny to it the equal protection of the laws in violation of the fifth and fourteenth amendments to the Federal Constitution." The refusal of this motion was made one of the grounds of the fourth exception to this Court. Your petitioner also raised the same contention by its fifth exception, which questions the correctness of the ruling of the trial judge in his charge to the jury. Answering this contention of your petitioner so made in its exceptions, this Court makes the following ruling:

"As judgments recovered in actions, in form, against the telegraph companies are to be paid by the Postmaster General, it can not be successfully contended that the recovery in this case will deprive the defendant of its property, without due process of law."

This conclusion on the part of the Court, however, in the judgment of your petitioner, does not meet the contention that the effect of rendering a judgment against it in this case is to deprive it of its property without due process of law, in violation of the fifth and fourteenth amendments to the Constitution of the United States. It is true, the Court states that the judgment is in form against your petitioner but in effect against the Postmaster General. Under the

decisions of the Supreme Court of the United States hereinbefore referred to, the judgment has absolutely no force whatever against the Postmaster General of the United States for the obvious reason that no Federal statute has ever authorized any judgment to be recovered against him in a state court, and therefore as to him
96 the judgment was rendered by a court that was wholly devoid of jurisdiction. In the absence of any Federal statute authorizing a suit to recover a judgment that would be effective against the property of the United States Government in the hands of its Postmaster General, such judgment, instead of being in effect against such official and the property in his charge, is a nullity. The judgment, however, is in form, under the ruling of the Court, against your petitioner, Western Union Telegraph Company. Its lien, therefore, operates on the property of that company and as has been shown, is wholly inoperative against any property of the Federal Government. This Court, it is therefore respectfully submitted, has entirely overlooked the fact that the judgment, which is has affirmed, operates, and can only operate, against the property of the corporation, and that there is nothing whatever in the record to prevent the plaintiff from issuing an execution against the property of the corporation in South Carolina to collect such judgment. The effect of the decision, therefore, may be stated thus:

Suit is brought against Western Union Telegraph Company for the acts of the Federal Government and a judgment is rendered against that company, which judgment is an absolute lien on its property and is not a lien on any property of the Postmaster General, for the obvious reason that the state court was without any power whatever to render any judgment that would bind such official or the property in his charge. The plaintiff in such suit to collect his judgment has the absolute right to levy upon the property of the corporation and it can make no defense whatever, but must pay up such judgment that is really the debt of another person, over whom the court issuing the execution not only did not have, but could not have, either any jurisdiction or any control. The property of the telegraph company under such a judgment is therefore rendered absolutely liable for the acts of another, and that other the sov-
97 ereign Government of the United States, for which it was not at all responsible. Its property is thus taken to pay the debts of another and it is left to the uncertainty of being able to recover from the Government in a proceeding for reimbursement before the Court of Claims in Washington.

The contract introduced in evidence, it is true, declares that the Postmaster General would indemnify the telegraph company against judgments, but this means, and can only mean, that such indemnity would only obtain in cases where the court rendering the judgment had jurisdiction of the subject-matter of the action and of the person of the real defendant, namely, the Postmaster General himself. Therefore, it necessarily follows that a judgment rendered in a state court which was without any jurisdiction of the real party in interest, to-wit, the Postmaster General, or of the subject-matter of the action,

would not be the subject of such indemnity and the whole matter would have to be tried over in the Court of Claims. The result would be that upon the proceeding brought by your petitioner for reimbursement in the Court of Claims, the Government would promptly take the position that this was not such a judgment as was contemplated in the contract, that it was not, and could not be held liable in the court that rendered such judgment, and therefore reimbursement would be adjudged against your petitioner.

It may be that one person can be held liable for the debt of another and as a substitute for such liability, be given the remedy of a proceeding for indemnity against that other, when all of the matters are to be determined in the same court, but no principle either of abstract justice or of fundamental law will allow one person to be held liable for damages in one court for the debt of another and such liability be excused on the ground that he has a right of action against that other in a wholly different court. Surely, if the Constitutional guarantees against the deprivation of a person of
98 his property without due process of law, set forth in the fifth and fourteenth amendments to the Constitution of the United States, mean anything, they mean that both legislatures and courts are without the power to hold a defendant in the situation of your petitioner liable for the acts of another person, compel it to pay for such acts and then be remitted for redress to a court of an entirely separate and distinct jurisdiction, where it may never receive one cent by way of reimbursement. As has been said, if this court had jurisdiction of the present action as well as the suit for reimbursement and could determine the entire rights of all parties, there might be some semblance of due process of law in compelling the defendant to pay this judgment to plaintiff, and then proceed in the same court against the Government for indemnity, but of the constitutionality of even such an action, your petitioner respectfully submits, that it has the gravest doubts. Where the courts are entirely separate and distinct, however and the judgment is rendered against your petitioner and the right of execution to collect such judgment existing in favor of the plaintiff is against its property and its property alone, then it would seem too obvious for argument that its right to a suit for reimbursement in a court of a wholly distinct and separate jurisdiction would not, and could not, save the action of the state court in making it liable for the default of another from being obnoxious to the due process of law clauses of the Constitution of the United States. In a nut shell, the contention of your petitioner is that under the fifth amendment, there was no power in Congress to make it liable and suable for the acts of the Federal Government, and similarly under the fourteenth amendment, there was no power in a state court to make it liable and suable for the acts of the Federal Government. Such a result would be against fundamental principles of justice as well as Constitutional guarantees, which
99 can neither be overturned by legislative fiat nor disregarded by judicial decree. The principle for which your petitioner contends is thus stated in the recent case of Haubert vs. B. & O. R. Co., 259 Fed. 361:

"Manifestly, it seems to me that in view of these conditions no liability exists against the railroad company itself for a personal injury due to operation under federal control, and that no judgment can be rendered therefor which will become a lien upon the corpus of its property or payment compelled therefrom. If this were done, the result would be that one person's property would be taken without his consent and without compensation to pay the debt of another. Liabilities thus arising during federal control, it must be conceded, are in substance debts of the United States, notwithstanding, for purposes of administration, the control and operation of the railroads have been vested in an official called the Director General of Railroads. An action against the Director General, based upon any contract or act of his, it may be admitted, is, in effect, a suit against the United States. See opinion of Rugg, C. J., in Public Service Commission v. New England Telegraph & Telephone Co., 232 Mass. 465, 122 N. E. 567, affirmed United States Supreme Court June 2, 1919, in MacLeod et al. v. New England Telephone & Telegraph Co., 250 U. S. 195, 39 Sup. Ct. 511, 63 L. Ed. —; also Northern Pacific Railway Co. v. State of North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. —, in United States Supreme Court, decided June 2, 1919, and cases cited."

The same principle was stated and applied in the recent case of Schumacher vs. Pennsylvania R. Co., 175 N. Y. Sup. 85.

Other authorities to the same effect are:

Attorney General vs. Old Colony R. Co., 22 L. R. A. 112.
Colon vs. Lisk, 60 Am. St. Rep. 609.
Knoxville Traction Co. vs. McMillan, 65 L. R. A. 296.
Ohio, etc. R. Co. vs. Lackey, 20 Am. Rep. 259.
Missouri, etc. R. Co. vs. Nebraska, 164 U. S. 403, 41 L. Ed. 489.
Daugherty vs. Thomas, 45 L. R. A. (New Series) 699.

If the principles herein contended for by your petitioner are sound, they are directly applicable to the facts of the present case, and upon being properly applied, would prevent the affirmance of the present judgment against your petitioner, as such affirmance would operate to deprive it of its property without due process of law.

100 The precise question that is involved in the present case recently came before the Supreme Court of Alabama and on the authority of the same decisions herein referred to, that court, in a unanimous opinion, held that the action could not be maintained against the telegraph company for the acts of the Government.

The court, in the course of its opinion, declared that under the Dakota Central Telephone Company case, the possession of the telegraph property by the Government was exclusive and that any action brought against the company during the operation of such telegraph lines was an action against the Government itself and could not be maintained in a state court. This conclusion, it is respectfully sub-

mitted, would seem to be the only conclusion possible under the decisions of the Supreme Court of the United States that control the question of liability in such cases. A copy of this decision of the Supreme Court of Alabama is herewith appended and made a part of this petition, and to it your petitioner would direct special attention.

Summing up what has been said, your petitioner respectfully contends that a rehearing should be granted it because the Court has overlooked matters both of law and of fact that are of such moment that if properly applied would require a reversal of the judgment in the case. The principles in question may be stated thus:

1. The judgment cannot be against the Western Union Telegraph Company in form, but in effect against the Postmaster General, for the reason that the Postmaster General, that is to say, the Government of the United States, is the real party in interest, and no authority having been granted by Congress to the state courts to entertain actions of this character against the government or the Postmaster General, its official, the state courts are wholly without jurisdiction to render any judgment that is effective against the Post-
101 master General.

2. Neither the proclamation of the President nor the order of the Postmaster General contemplated suits in any court. The contract between the Postmaster General and the company indemnifies the latter against suits, but this indemnity provision of the contract did not confer jurisdiction on the state courts; and even if the attempt had been made by such provision to confer such jurisdiction, it would have been an ultra vires on the part of the Postmaster General as Congress alone possesses the power to confer jurisdiction of such actions on the state courts.

3. The judgment in this case is against the Western Union Telegraph Company, is a lien on its property, and can be collected by an execution levied on such property. Such being the force of the judgment, it operates to compel the telegraph company to pay the debt of the Government, and thereby deprives the telegraph company of its property without due process of law in violation of the fifth and fourteenth amendments to the Federal Constitution.

Wherefore, your petitioner prays that it have leave to file this petition, that the remittitur herein be stayed, and that upon consideration of the grounds hereinbefore set forth, it be granted a rehearing of the cause.

And your petitioner will ever pray, etc.

WILLCOX & WILLCOX,
FRANCIS H. WESTON,
Attorneys for Petitioner.

I, J. P. McNeill, hereby certify that I am a duly licensed practicing attorney of the State of South Carolina, enrolled as such in the Supreme Court of the State; that I have carefully examined all

the grounds of the foregoing petition, and that I verily believe that there is merit therein.

I hereby further certify that I am not of counsel in the cause and am in no way concerned therein.

J. P. McNEILL.

102 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1919.

S. B. POSTON, Respondent,

versus

WESTERN UNION TELEGRAPH COMPANY, Appellant.

Appeal from Williamsburg County.

Hon. W. H. Townsend, Judge.

Order.

The appellant in this cause, by its counsel, Willcox and Willcox and Francis H. Weston, having presented a petition for a rehearing of said cause, it is, upon consideration of said petition,

Ordered That the said petition be filed and that the remittitur herein be stayed until the further order of this Court.

(Signed) D. E. HYDRICK,
A. J.

Feb'y 4, 1920.

103 STATE OF SOUTH CAROLINA:

In the Supreme Court.

S. B. POSTON, Respondent,

vs.

WESTERN UNION TELEGRAPH CO., Appellant.

Petition dismissed and stay order revoked.

EUGENE B. GARY, *C. J.*
D. E. HYDRICK, *A. J.*
R. C. WATTS, *A. J.*
T. B. FRASER, *A. J.*
GEO. W. GAGE, *A. J.*

Filed Feb. 23, 1920.

HARRY McCAW,
Clerk.

104 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1919.

S. B. POSTON, Respondent,

versus

WESTERN UNION TELEGRAPH COMPANY, Appellant.

Appeal from Williamsburg County.

Hon. W. H. Townsend, Judge.

Petition.

To the Honorable the Supreme Court of the State of South Carolina:

Your petitioner, Western Union Telegraph Company, respectfully shows:

1. That on the 27th day of January, 1920, this Honorable Court rendered a decision in the above entitled cause, wherein and whereby it affirmed the judgment rendered by the lower court against your petitioner, and thereafter on the 5th day of February, 1920, your petitioner filed a petition in this Honorable Court praying for a reargument of the cause, which said petition for reargument was refused and the judgment made final by an order of the Court filed on the 23d day of February, 1920.

2. That in the appeal to this Court, your petitioner set up and claimed that under the joint resolution of Congress, dated
105 July 16, 1918, and the proclamation of the President, dated July 22, 1918, assuming control and possession of all telegraph lines, this action could not be maintained against it, as the real party in interest was the Government of the United States and the State courts were without jurisdiction to try such action, and that to permit the action to be maintained against it would deprive it of its property without due process of law and would deny to it the equal protection of the laws, in violation of the fifth and fourteenth amendments to the Constitution of the United States; and that the decision of this Court, affirming the judgment rendered by the lower court against your petitioner and thereby holding your petitioner liable to the plaintiff, was against the right, title, privilege or immunity so claimed by it under the Constitution, the joint resolution of Congress and the proclamation of the President.

3. That under the provisions of Section 237 of the Judicial Code of the United States, as amended by the Act of September 6, 1916 (39 Stat. L., 726), your petitioner is entitled to apply to the Supreme Court of the United States, within ninety days, for a writ of certiorari to this Honorable Court in order to have reviewed the decision of this Honorable Court against such title, right, privi-

lege or immunity so claimed by it under the Constitution of the United States, the joint resolution of Congress and the proclamation of the President.

Wherefore, your petitioner prays that the remittitur herein be stayed for ninety days from the date hereof in order that it may apply to the Supreme Court of the United States for a writ of certiorari, pursuant to the provisions of Section 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. L., 726).

And your petitioner will ever pray, etc.

WILLCOX & WILLCOX,
FRANCIS H. WESTON,
Attorneys for Petitioner.

106 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1919.

S. B. POSTON, Respondent,

versus

WESTERN UNION TELEGRAPH COMPANY, Appellant.

Appeal from Williamsburg County.

Hon. W. H. Townsend, Judge.

Order.

Upon hearing the petition of Western Union Telegraph Company in this action for a stay of remittitur, pending its application to the Supreme Court of the United States for a writ of certiorari and upon motion of Willcox & Willcox and Francis H. Weston, attorneys for said petitioner, it is

Ordered that the remittitur herein be, and the same is hereby, stayed for a period of ninety days from the date hereof, in order to allow the petitioner, Western Union Telegraph Company, to present and file in the Supreme Court of the United States its petition for a writ of certiorari, pursuant to the provisions of Section 237 of the Judicial Code of the United States as amended by the Act of September 6, 1916 (39 Stat. L. 726).

(Signed) EUGENE B. GARY,
Chief Justice.

23 Feb'y, 1920.

107 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

S. B. POSTON, Plaintiff-Respondent,

against

WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

I, Harry McCaw, Clerk of the Supreme Court of the State of South Carolina, do hereby certify that the foregoing is a true and correct copy of the record and proceedings, and the whole thereof, in the case of S. B. Poston, Plaintiff-respondent, versus Western Union Telegraph Company, Defendant-appellant, as appears by the records now on file in my office.

Given under my hand and seal of said Court at Columbia, South Carolina, this 12th day of March, 1920.

[Seal Supreme Court of South Carolina.]

HARRY McCAW,
Clerk of the Supreme Court of the State of South Carolina.

[Endorsed:] Supreme Court of the United States. Western Union Telegraph Company, Petitioner, versus S. B. Poston, Respondent. Transcript of Record. Law offices Willcox & Willcox, Florence, S. C.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Carolina, Greeting:

Being informed that there is now pending before you a suit in which Western Union Telegraph Company is appellant, and S. B. Poston is appellee, which suit was removed into the said Supreme Court by virtue of an appeal from the Court of Common Pleas of Williamsburg County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,588. Supreme Court of the United States, No. 833, October Term, 1919. Western Union Telegraph Company vs. S. B. Poston. Writ of Certiorari.

In the Supreme Court of the United States, October Term, 1919.

No. 833.

WESTERN UNION TELEGRAPH CO., Petitioner,

v.

S. B. POSTON.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the Supreme Court of South Carolina, to the writ of certiorari granted therein.

HENRY E. DAVIS,
Counsel for Petitioner.
PHILIP H. ARROWSMITH,
Counsel for Respondent.

I, Harry McCaw, Clerk of the Supreme Court of South Carolina, certify that the above is a true copy of original stipulation as to return to Writ of Certiorari in case of Western Union Telegraph Company, Petitioner vs. S. B. Poston, filed in office of the Clerk of the Supreme Court of South Carolina, 4th May, 1920.

Witness my hand and Seal of the Supreme Court of South Carolina, at Columbia, this 14th day of May, A. D. 1920.

[Seal Supreme Court of South Carolina.]

HARRY McCAW,
Clerk Supreme Court of South Carolina.

[Endorsed:] 833/27,588. In the Supreme Court of the United States. Western Union Telegraph Co., Petitioner, vs. S. B. Poston. Stipulation. Copy. Law Offices Willcox & Willcox, Florence, S. C.

[Endorsed:] File No. 27,588. Supreme Court U. S., October Term, 1919. Term No. 293. Western Union Telegraph Co., Petitioner, vs. S. B. Poston. Writ of certiorari and return. Filed May 22, 1920.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No.

WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

versus

S. B. POSTON, RESPONDENT.

PETITION UNDER PROVISIONS OF SECTION 237 OF THE JUDICIAL CODE AS AMENDED BY THE ACT OF SEPTEMBER 6, 1916 (39 STAT. AT L., 726), FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA, AND BRIEF IN SUPPORT THEREOF.

PETITION.

To the honorable the Supreme Court of the United States:

Now comes Western Union Telegraph Company, petitioner, respectfully representing that it is aggrieved by a final judgment of the Supreme Court of the State of South Carolina, passed and entered on the 23d day of February, A. D. 1920, in a certain cause then pending, wherein your petitioner, Western Union Telegraph Company, was appellant

and S. B. Poston was respondent, being No. 27 of the October term, 1919, of said court; that the matters at issue in said cause are of peculiar gravity and importance in that they involve (1) the right of your petitioner, and also of all other telegraph and telephone companies similarly situated, to exemption from liability for the acts of the Postmaster General of the United States and of his agents, servants, and employees during the period its telegraph system was in the exclusive and complete possession and control of the United States and was being operated by the United States under the provisions of Joint Resolution of Congress No. 834, adopted July 16, 1918, and the proclamation of the President issued pursuant thereto July 22, 1918, and (2) the non-existence of any right on the part of any individual citizen to recover against your petitioner, or any other telegraph or telephone company similarly situated, on a cause of action arising out of a transaction had with the Postmaster General of the United States in his possession, control, and operation of the wire lines; that the judgment of said Supreme Court of South Carolina here complained of holds that your petitioner is liable for the aforesaid acts of the Postmaster General of the United States and his agents, servants, and employees under the circumstances stated; that, as will appear from a consideration of the brief hereto annexed in support of this petition, the said judgment is contrary to the decisions of this court determining the status of the wire companies with respect to their properties during the period of Government control and operation under the war measures adopted by Congress and the actions of the President pursuant thereto, the decisions of this court holding that no suit can be maintained against the United States or one of its officials, either directly or indirectly, without its consent, and the decisions of this court enforcing the due process of law clauses of the Fifth and Fourteenth Amendments to the Federal Constitution; wherefore, in order that its rights, as well as those of

other wire companies, may be authoritatively ascertained and declared respecting causes of action accruing during the period of Government possession, control, and operation, petitioner prays the issuance of a writ of certiorari herein, as provided by law.

The particular facts and grounds upon which this application is based are as follows:

On October 2d and 3d, 1918, certain telegrams passed between the respondent, S. B. Poston, at Johnsonville, South Carolina, and W. B. Ravenel & Company, cotton brokers in Charleston, South Carolina, for the purpose of effecting a sale of two hundred bales of cotton. Alleging that in response to his inquiry an offer for the cotton had been made by the brokers, but that by reason of delay in transmitting the offer and the acceptance thereof, he had lost a sale of the two hundred bales of cotton at the price quoted and was compelled, by reason of a decline in the market, subsequently to sell the cotton at a reduced price, the respondent commenced this action against the petitioner, Western Union Telegraph Company, in the Court of Common Pleas for Williamsburg County, South Carolina, to recover as damages the difference between the price offered and the price at which he actually sold the two hundred bales of cotton. The telegraph company, as defendant in the action, answered the complaint, and, besides pleading in substance a general denial and a specific denial that it was operating a telegraph line at the time the cause of action accrued, alleged by way of affirmative defense that under Joint Resolution of Congress No. 834, adopted July 16, 1918, the proclamation of the President, dated July 22, 1918, and the orders of the Postmaster General, its entire system was taken over by the United States and at the time the cause of action accrued was being operated exclusively by the United States.

In due course the case came on for trial in the lower court and the defendant saved all of its rights and conten-

tions as to its non-liability by appropriate objections to testimony and requests for instructions in its favor. All of its contentions having been overruled, a verdict in favor of the plaintiff was duly rendered, judgment was thereupon entered, and an appeal was prosecuted to the Supreme Court of the State.

In this appeal your petitioner, the defendant therein, contended (1) that the possession, control and operation of its telegraph system by the United States at the time the cause of action accrued was such under the Federal Constitution, the acts of Congress, and the proclamation of the President as to prevent the maintenance of this suit against it, because such possession, control, and operation on the part of the United States was in its sovereign capacity and was so complete and exclusive as to leave no ground upon which to base liability of the defendant, and, the United States being the real party in interest, the suit could not be maintained against the United States in a State court, but, under the provisions of the Federal statutes, could only be maintained in the district court or the Court of Claims of the United States, and (2) that the complete and exclusive possession, control, and operation of its telegraph system by the United States in its sovereign capacity precluded any liability on the part of the defendant, for the reason that to hold otherwise would deprive defendant of its property without due process of law and deny to it the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the Federal Constitution. All of these contentions on the part of the defendant were overruled by the court and the judgment below against your petitioner was thereby affirmed on January 30, 1920, the court stating in its decision that the judgment was in form against Western Union Telegraph Company, but in effect against the United States, and that by reason of this fact the telegraph company could not successfully contend that in paying such judgment it would be deprived of its property without due process of law, as it

would have the right to appeal to the United States for reimbursement. A motion for rehearing was promptly made, which was overruled by an order filed on February 23, 1920.

Your petitioner represents that said judgment of the Supreme Court of South Carolina is erroneous, as it is not liable on causes of action arising out of the operation of its properties by the United States and cannot be held liable on such causes of action consistently with the due process of law clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States; that upon such judgment its property can be seized and sold and it compelled to pay the same out of its funds, and its reimbursement would depend upon the decision of the United States as to whether it was liable to reimburse petitioner, and therefore that the judgment, if enforced, would take its property to pay the debt of another, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; and, further, that no private citizen has the right to recover a judgment against it that will be effective against the United States, as no consent has ever been given to sue the Postmaster General or the United States, either directly or indirectly, in the State courts; that this is one of a large number of similar suits that have been instituted and are now pending against your petitioner in various State courts throughout the United States on causes of action accruing during the period of Government possession, control, and operation, and your petitioner is advised that a large number of like suits have also been brought and are now pending on similar causes of action arising during their operation by the United States against the various other wire companies similarly situated in the United States; that in order that there may be a proper adjustment and settlement of all matters arising between the petitioner and all other wire companies and the United States Government with respect to claims arising during the period of Government possession and control and growing out of the operation of their prop-

erties by the United States, it is essential that this court declare and establish a uniform rule governing these matters for the guidance both of the wire companies and the United States, and that without such uniform rule these matters, of the gravest general importance, must be left for their determination to the conflicting adjudications of the various State courts.

Wherefore, because and by reason of the general interest in and the general importance of the issues involved, and for the other reasons above stated, your petitioner prays that a writ of certiorari to review the cause be issued to said Supreme Court of South Carolina, as in such case is provided by section 237 of the Judicial Code as amended by the act of September 6, 1916 (39 Stat. at L., 726).

WESTERN UNION TELEGRAPH COMPANY,
Petitioner.

By RUSH TAGGART,
FRANCIS R. STARK,
P. A. WILLCOX,
F. L. WILLCOX,
HENRY E. DAVIS,
Its Attorneys.

BRIEF.

The wire systems were taken over by the Government under Joint Resolution of Congress No. 834, adopted July 16, 1918, President's proclamation, July 22, 1918, and Postmaster General's Order No. 1783, issued August 1, 1918, and continued in the possession and control of the Government until August 1, 1919. The cause of action involved in this suit accrued October 3, 1918, at which time the Western

Union Telegraph Company had ceased its functions and obligations as a carrier, and its agents, employees, and servants had become those of the United States, and its telegraph system was being operated by the Postmaster General on behalf of the United States.

Such being the facts, the real questions are (1) whether the Western Union Telegraph Company, and other wire companies similarly situated, can be held liable to the sender of a telegram for a delay in its transmission and delivery when it appears that the contract made by such sender was with the agents and employees of the Postmaster General of the United States and at a time when the telegraph system of such company was in the possession and control and was being operated by the United States through the Postmaster General, and (2) whether an individual citizen has the right to recover against the Western Union Telegraph Company, or any other wire company similarly situated, on a cause of action growing out of the operation of its telegraph system and accruing during the period of Federal possession and control, a judgment in the State courts which will be effective and operative against the United States when neither consent to bring nor jurisdiction to maintain in the State courts such indirect suit against the United States has ever been given. In its opinion filed herein, the Supreme Court of the State has affirmed the existence of such liability against the defendant and of such right in favor of a private citizen, and by this application the petitioner seeks a review of such conclusions. Without unnecessary elaboration, the principles that demonstrate the error of the court's conclusion may be thus stated:

1. The effect of the Congressional and Presidential action in taking over the wire systems was "not a mere public supervision of an operation by private owners." On the contrary, it was an absolute, complete, and exclusive possession, control, and operation of such systems by the Federal Govern-

ment in its sovereign capacity, to the exclusion of all state action and of every private interest.

North Pacific R. Co. vs. North Dakota ex rel. Langer, 250 U. S., 135.

Dakota Central Tel. Co. vs. South Dakota ex rel. Payne, 250 U. S., 163.

Burleson vs. Dempey, 250 U. S., —.

Public Service Commission vs. N. E. Tel. & Tel. Co. (Mass.), 122 N. E., 567, affirmed in McLeod *vs.* N. E. Tel. & Tel. Co., 250 U. S., 195.

Therefore the Western Union Telegraph Company was in no way concerned with the transmission of the telegrams involved in the suit and no liability can exist against it, as the owner of the system over which the Government handled the messages, unless imposed by the joint resolution and the proclamation pursuant thereto.

2. The joint resolution of July 16, 1918, and the proclamation pursuant thereto do not impose nor attempt to impose liability upon the telegraph companies for the acts of the agents, servants, and employees of the Postmaster General of the United States. Hence the Western Union Telegraph Company is neither liable nor suable for the acts of the Postmaster General and his agents, servants, and employees.

Dakota Central Tel. Co. vs. South Dakota ex rel. Payne, 250 U. S., 163.

Public Service Commission vs. N. E. Tel. & Tel. Co. (Mass.), 122 N. E., 567, affirmed in McLeod *et al. vs.* N. E. Tel. & Tel. Co., 250 U. S., 195.

S. W. Bell Tel. Co. vs. State (Okla.), 181 Pac., 487.

State ex rel. Attorney General vs. Wisconsin C. Tel. Co. (Wis.), 172 N. W., 225.

S. W. Tel. & Tel. Co. vs. Houston, 256 Fed., 690.

Florida ex rel. R. R. Commission vs. Postmaster General et al., 255 Fed., 604.

State ex rel. Collins vs. Cumberland Tel. & Tel. Co. (Miss.), 81 Southern, 404, and 82 Southern, 311.

Canidate vs. Western Union Tel. Co. (Supreme Court of Alabama)—not yet reported.

Notwithstanding the broader scope and the more elaborate provisions, including one respecting suits, of the congressional legislation in respect to the transportation lines, the decisions on Federal control of railroads all establish the non-liability of the corporations for the acts of the employees of the Director General. Hence they strongly sustain the position that the wire companies cannot be held liable for the acts of the Postmaster General and his agents, servants, and employees.

Northern Pacific R. Co. vs. North Dakota ex rel. Langer, 250 U. S., 135.
Rutherford vs. Union Pac. R. Co., 254 Fed., 880.
Southern Cotton Oil Co. vs. A. C. L. R. R. Co., 257 Fed., 143.
Hatcher vs. Atcheson, etc., R. Co., 258 Fed., 952.
Haubert vs. B. & O. R. Co., 259 Fed., 361.
Nash vs. Southern Pacific Co., 260 Fed., 280.

3. Not only is the Western Union Telegraph Company, under the joint resolution and the proclamation, neither liable nor suable in the State courts with respect to the matters here complained of, but it is neither the principal nor the master of the Postmaster General's agents and servants, and is therefore under no theory responsible for their acts. On the contrary, the recovery had against it in this case is a recovery in a case where only the United States, if anyone, is responsible, and where the United States, or its representative, the Postmaster General, was the real party in interest. Neither the United States nor its Postmaster General could be sued in such a case without consent granted by an act of Congress, and the only consent ever given by Congress to suits of any character against the United States is found in section 24, paragraph 20 (conferring jurisdiction on the United States District Court), and section 145 (conferring jurisdiction on the Court of Claims) of the Judicial Code.

Since the real party in interest was the United States, or its representative, the Postmaster-General, the State courts could not in the guise of awarding judgment against the corporation, which was in no way concerned with the matters in controversy, render a judgment effective against the United States or its Postmaster-General, as such courts were wholly devoid of any jurisdiction of either the person of the real defendant or the subject-matter of the action. The rendering of such a judgment is a palpable attempt on the part of the State courts to interfere with the United States Government behind its back, and this cannot be done.

Northern Pacific R. Co. vs. North Dakota ex rel. Langer, 250 U. S., 135.

Wells vs. Roper, 246 U. S., 335; 62 L. ed., 755.

Louisiana vs. McAdoo, 234 U. S., 627; 58 L. ed., 1506.

United States ex rel. Goldberg vs. Daniels, 231 U. S., 218; 58 L. ed., 191.

Louisiana vs. Garfield, 211 U. S., 70; 53 L. ed., 92.

Kansas vs. United States, 204 U. S., 331; 51 L. ed., 510.

Naganab vs. Hitchcock, 202 U. S., 473; 50 L. ed., 1113.

Oregon vs. Hitchcock, 202 U. S., 60; 50 L. ed., 935.

International Postal Supply Co. vs. Bruce, 194 U. S., 601; 48 L. ed., 1134.

Minnesota vs. Hitchcock, 185 U. S., 373; 46 L. ed., 954.

Belknap vs. Schild, 161 U. S., 10; 40 L. ed., 599.

Ex parte Ayers, 123 U. S., 443; 31 L. ed., 216.

4. The entire systems of the telegraph companies having been seized *in invitum*, the joint resolution would violate the Fifth Amendment to the Federal Constitution if it imposed liability upon the companies for acts committed by the United States and its agents during the period of Gov-

ernment possession, control, and operation, because it would thereby mulct the corporations for the debts of the United States and authorize the taking of their property for the private use of persons whose real claims were against the United States, and would thus deprive such corporations of their property without due process of law.

Schumacher vs. Penn. R. Co., 175 N. Y. S., 84.
Missouri, etc., R. Co. vs. Nebraska, 164 U. S., 403.
Mo. Pac. R. Co. vs. Nebraska, 217 U. S., 196.
St. Louis, etc., R. Co. vs. Wynne, 224 U. S., 354.
Ochoa vs. Hernandez, 230 U. S., 139.
Chicago, etc., R. Co. vs. Polt, 232 U. S., 165.
Haubert vs. Baltimore, etc., R. Co., 259 Fed., 361.
Daugherty vs. Thomas (Mich.), 45 L. R. A. (N. S.), 699.
Attorney General vs. Old Colony R. R. Co. (Mass.), 22 L. R. A., 112.
Colon vs. Lisk (N. Y.), 60 Am. St. Rep., 609.
Knoxville Traction Co. vs. McMillan (Tenn.), 65 L. R. A., 296.

In the recent case of *Nash vs. Southern Pacific Co.*, 260 Fed., 280, the court, in ruling on the identical question under the act applying to railroads, said:

> "But that it was intended as the purpose of section 10, as urged by plaintiff, to authorize suits against the owners of these properties in causes of action arising out of transactions had with the Federal Railroad Administration, or through torts committed by its agents while under its control—things for which, we repeat, the owners could be in no way responsible—may not for a moment be indulged; such a construction would clearly render the provision obnoxious to the objection of authorizing the taking of property without due process of law, a purpose which may not be imputed to Congress."

5. The entire systems of the telegraph companies having been seized *in invitum* and the Joint Resolution not having attempted to impose any liability upon the companies for acts committed by the United States and its agents during the period of Government possession, control and operation, the action of the State courts in imposing such liability upon the petitioner violates the provisions of the Fourteenth Amendment to the Federal Constitution, as it compels such corporation to pay the debts of the United States and authorizes the taking of its property for the private use of a person whose real claims are against the United States, and thus deprives it of its property without due process of law and denies to it the equal protection of the laws.

Chicago, etc., R. Co. vs. Chicago, 166 U. S., 226.

The precise question involved in the present case has recently been decided by the Supreme Court of Alabama in the case of *Candiate vs. Western Union Telegraph Company* (not yet reported), by the Court of Appeals of Alabama in the case of *Western Union Telegraph Company vs. Glover* (not yet reported), by the Court of Civil Appeals of Texas in the case of *Western Union Telegraph Company vs. Wallace* (not yet reported), by the Supreme Court of Arkansas in the case of *Davis vs. Western Union Telegraph Company* (not yet reported), and by the Springfield (Missouri) Court of Appeals (not yet reported). In each of these cases, the court, in a unanimous opinion, held that the suit could not be maintained against the telegraph company, as the right of action, if any, was against the United States alone. It thus appears that the decision of the Supreme Court of South Carolina is not only opposed to the principles established and applied by the Federal courts in numerous similar cases, but is also opposed to direct adjudications of the courts of other States on the identical question.

For the foregoing reasons, it is respectfully submitted, a writ of certiorari should be granted.

RUSH TAGGART,
FRANCIS R. STARK,
P. A. WILLCOX,
F. L. WILLCOX,
HENRY E. DAVIS,
Attorneys for Western Union Telegraph Company.

Notice.

To S. B. Poston and
Arrowsmith, Muldrow, Bridges & Hicks,
Attorneys of Record:

Take notice that on Monday, March 29, 1920, at 12 o'clock noon, the above petition for certiorari and brief accompanying the same will be submitted to the Supreme Court of the United States for its consideration and action.

RUSH TAGGART,
FRANCIS R. STARK,
P. A. WILLCOX,
F. L. WILLCOX,
HENRY E. DAVIS,
Attorneys for Petitioner.

Service of the foregoing notice and receipt of copy of the petition for writ of certiorari and brief attached thereto is hereby acknowledged this 12th day of March, 1920.

ARROWSMITH, MULDROW,
BRIDGES & HICKS,
Attorneys for S. B. Poston.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

WESTERN UNION TELEGRAPH COMPANY, petitioner, v. S. B. POSTON. No. 833.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

SUGGESTIONS OF THE UNITED STATES RELATIVE TO THE GRANTING OF THE WRIT.

Comes now the Solicitor General on behalf of the United States and makes the following suggestions relative to the granting of a writ of certiorari in the above-entitled cause:

In November, 1918, while the telegraph lines of the petitioner herein were being operated by the United States as hereinafter stated, the respondent herein filed in the Court of Common Pleas for Williamsburg County, South Carolina, a suit against said petitioner to recover damages alleged to have been sustained on account of the loss of a sale of certain cotton by reason of the alleged delay of said petitioner in delivering certain telegrams relating to said sale. A verdict and judgment for the sum of $1,548.15 having been entered in favor of the plaintiff, an appeal was taken by the

telegraph company to the Supreme Court of South Carolina, wherein the judgment of the trial court was affirmed.

The acts and things complained of in said suit occurred during the period that the telegraph systems of the country, including the lines of said petitioner, were under the control and operation of the Postmaster General acting on behalf of the United States, pursuant to the joint resolution of Congress adopted July 16, 1918, the Presidential proclamation of July 22, 1918, and the order of said Postmaster General dated August 1, 1918.

A contract had been entered into between the Postmaster General and the petitioner on October 9, 1918, wherein it was provided, among other things, that (R. 61):

> The Postmaster General shall pay, or save the owner harmless from all expenses incident to, or growing out of the possession, operation and use of the property taken over during the period of Federal control. He shall also pay, or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it, by reason of any cause of action arising out of Federal control, or anything done or omitted in the possession, operation, use or control of its property, during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General of the United States.

The defendant telegraph company pleaded in said case that it was not subject to suit for causes arising during Government operation; that the suit if maintained against it was in effect against the United States, which had not consented to be sued, nor authorized petitioner to be sued on causes so originating. Said State courts held that said telegraph company could be sued for such causes, and in effect the Supreme Court of South Carolina holds that this can be done by reason of the above-quoted clause of said contract between petitioner and the Postmaster General.

The United States is advised that the telegraph company will claim that it (the United States) should reimburse the petitioner on account of the judgment herein if said petitioner is compelled to satisfy the same. In view of the fact that similar suits have been instituted and are now pending in the various State courts throughout the country against the petitioner and other wire companies in which the cause of action accrued during the period of Federal operation of such telegraph lines, which suits would be controlled largely by a decision of this court in the instant case, the United States respectfully begs leave to join in the request that a writ of certiorari issue herein.

ALEX. C. KING,
Solicitor General.

APRIL, 1920.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 833.

WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

vs.

S. B. POSTON.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

MOTION BY THE PETITIONER TO ADVANCE.

Comes now the petitioner, The Western Union Telegraph Company, and respectfully moves that the above-entitled cause, in which a writ of certiorari was granted on April 26th last, be advanced for early hearing during the October, 1920, term of this court.

The question involved is whether the Western Union Telegraph Company can be held liable for failure to transmit, or error or delay in transmitting, messages handled over its wire system in the United States during the period between

August 1, 1918, and August 1, 1919, while its lines were in the exclusive and complete possession and control of the United States, and being operated by the United States, under the provisions of joint resolution of Congress No. 834, adopted July 16, 1918, and the proclamation of the President issued pursuant thereto July 22, 1918.

This question, so far as the Western Union lines are concerned, has been raised in over seven hundred actions at law, brought in various courts throughout the United States; and additional actions involving the same question are continuing to be brought from day to day. Over three hundred and fifty of these actions have been disposed of in favor of petitioner, on the ground that petitioner was not and could not be liable for the acts of the Government of the United States; and such has been the holding of courts of last resort in the States of Alabama, Arkansas, and Kentucky, and of appellate courts (though not the courts of last resort) in Missouri and Texas. No appellate court in any State, with the exception of the Supreme Court of South Carolina in the case at bar, has held that the petitioner is liable in such cases; but by reason of the decision of the Supreme Court of South Carolina in the present case the inferior courts in South Carolina are continuing and will continue to entertain such actions.

Notice of this motion has been served on opposing counsel.

RUSH TAGGART,
FRANCIS R. STARK,
P. A. WILLCOX,
F. L. WILLCOX,
HENRY E. DAVIS,
Attorneys for Western Union Telegraph Company.

The United States joins in the above request.

ALEX. C. KING,
Solicitor General.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 293.

WESTERN UNION TELEGRAPH COMPANY,
Appellant,

against

S. B. POSTON,
Appellee.

BRIEF AS AMICI CURIAE ON BEHALF OF APPELLEE.

The construction of the contract between the appellant and the Postmaster General will affect generally the rights of numerous claimants against telegraph and telephone companies arising out of the operation under Government control. It will affect particularly the rights of a litigant we represent in an action entitled *Herstein* v. *New York Telephone Company,* now pending in the Supreme Court, State of New York, County of New York. Upon the written consent of the attorneys for both sides of this appeal, we ask leave of the Court to file this brief as *amici curiae* and respectfully

pray that, in the construction of the said contract and particularly Sections 8(e) and 15 thereof, the Court take into consideration the facts in the *Herstein* case, *supra*.

Facts.

Herstein, an infant, while walking on one of the streets in the City of New York, on February 26, 1919, received serious injuries due to the falling of a pole bearing telephone wires. The Telephone Company by its answer admits it erected the pole long prior to the joint resolution on July 16, 1918, and the proclamation and orders pursuant thereto, but disclaims liability for the injuries received by the plaintiff on the ground that its lines at the time of the accident were "under the operation and control of the Federal Government." The agreement between the New York Telephone Company and the Postmaster General is identical with the one between appellant and the Postmaster General in the present case (Exhibit No. 4, p. 41).

The Supreme Court of the State of South Carolina has affirmed the existence of liability against the wire company under the terms of this agreement. We submit that the following principles justify the decision of the Court:

1. We agree with appellant's view that a tort claimant would have no right of action against the United States (*Belknap* v. *Schild*, 161 U. S., 10, and other cases cited in appellant's brief). He either has his remedy directly against the wire company, or he has no remedy at all. If the contract between the wire company and the Postmaster

General is not capable of a construction that would protect both the wire company and the public, injuries to large numbers of claimants will go without remedy. The sections of the agreement involved are Section 8(e) and Section 15.

Section 8(e) (p. 46) provides, in part:

> "The Postmaster General shall * * * also pay or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it, by reason of any cause of action arising out of Federal control, or anything done or omitted in the possession, operation, use or control of its property, during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General or the United States."

Section 15 (p. 73) provides:

> "In presenting this proposal it is understood that only the salient features incident to the relations of the parties have been described and that further details not covered arising from the operation of the property by the Postmaster General shall be settled in conformity with the broad principles herein enunciated."

In construing these two sections of the agreement, effect should also be given to the statement of the Postmaster General in his Order No. 1783 (Exhibit No. 3, p. 40), assuming control of the lines, that the purpose was to operate the lines as a national system "with due regard to the interest of the public and the owners of the property."

The sections just cited must be given some effect; they cannot be considered void. A contract must be so construed as to give meaning and effect to all its provisions.

Burdon Century Sugar Ref. Co. v. *Payne*, 167 U. S., 127, 142.
Hobbs v. *McLean*, 117 U. S., 567, 576.
U. S. v. *Central Pacific R. R. Co.*, 118 U. S., 235, 241.
Utley v. *Donaldson*, 94 U. S., 29, 46.
Binghamton Bridge, 3 Wall., 51, 73.

It will not be seriously contended by the appellant that either the Government or the wire company intentionally omitted provision in the agreement for the protection of such of the public as might be injured during the ordinary course of operation. The very insertion of Section 15 in the contract argues to the contrary.

2. Section 8(e) and Section 15, taken together and broadly construed, may be considered to be a provision for the protection of injured members of the public in suits against the wire company, as well as protection for the wire company by reimbursement from the Postmaster General. Any other construction would be harsh and unjust and would be contrary to the established rule that "When an instrument is capable of two constructions, one working injustice and the other consistent with the right of the case, that one should be favored which standeth with the right."

Norman v. *Bradley*, 9 Wall., 394, 407.
Utley v. *Donaldson*, *supra*.
Binghamton Bridge, *supra*.
Hoffman v. *Aetna Ins. Co.*, 32 N. Y., 405.

It must be assumed that the Postmaster General, in preparing this form of agreement, did not intend to deprive claimants of their common law remedies, and that he knew at the time of the execution of the agreement that tort claimants could not institute suits against the Government. We are forced to the conclusion, therefore, that he intended by the provisions of Section 8(e) to protect both the public and the companies; the former, because, by implication, suits were permitted against the companies; the latter, because, by express provision of the contract, he agreed to indemnify them against judgments recovered in such suits. In giving these provisions this fair and equitable construction no injury is done to the Government, for it is merely called upon to do what it agreed to do; no injury is done to the wire companies, for the Government is to reimburse them for all moneys so paid out; no injury is done to the public, for claimants are not then deprived of remedies for injuries sustained. The contrary construction urged by the appellant would be a harsh, inequitable and unjust one which would benefit only the party who framed the contract.

3. Order No. 2114 (Exhibit No. 4, p. 41), the agreement in question, is the form provided by the Postmaster General to all wire companies. If a doubt in the construction of its provisions arises, it must be construed strongly against the Postmaster

General, for language must be construed most strongly against the party employing it.

Grace v. *American Central Ins. Co.*, 109 U. S., 278, 282.
American Surety Co. v. *Pauly*, 170 U. S., 133, 144.
Insurance Companies v. *Wright*, 1 Wall., 456, 468.

4. It is respectfully submitted that the judgment of the Supreme Court of South Carolina should be affirmed.

WM. M. SILVERMAN,
JOSEPH P. TOLINS,
Counsel *amici curiae* on behalf of appellee.

SUBJECT INDEX.

Table of Cases.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 293.

WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

vs.

S. B. POSTON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF WESTERN UNION TELEGRAPH COMPANY.

Statement of Case.

The question involved in this case is whether the Western Union Telegraph Company, herein called the telegraph company, can be held liable for failure to transmit, or for error or delay in transmitting, messages handled over its telegraph system in the United States during the period between August 1, 1918, and August 1, 1919, while its lines were in the exclusive and complete possession and control of the United

States, and being operated by the United States, under the provisions of joint resolution of Congress No. 834, adopted July 16, 1918, and the proclamation of the President issued pursuant thereto, July 22, 1918.

The controversy thus arose: On October 2 and 3, 1918, certain telegrams passed between the respondent, S. B. Poston, at Johnsonville, South Carolina, and W. B. Ravenel & Company, cotton brokers in Charleston, South Carolina, for the purpose of effecting a sale of two hundred bales of cotton. Alleging in his complaint that in response to his inquiry an offer for the cotton had been made by the brokers, but that by reason of delay in transmitting the offer and the acceptance thereof, he had lost a sale of the two hundred bales of cotton at the price quoted and was compelled, by reason of a decline in the market, subsequently to sell the cotton at a reduced price, the respondent commenced this action against the telegraph company, in the Court of Common Pleas for Williamsburg County, South Carolina, to recover as damages the difference between the price offered and the price at which he actually sold the two hundred bales of cotton (Transcript, pp. 2-4). The telegraph company, as defendant in the action, answered the complaint, and, besides pleading in substance a general denial and a specific denial that it was operating a telegraph line at the time the cause of action accrued, alleged by way of affirmative defense that under joint resolution of Congress No. 834, adopted July 16, 1918, the proclamation of the President, dated July 22, 1918, and the orders of the Postmaster General, its entire system was taken over by the United States and at the time the cause of action accrued was in the possession and control of and was being operated exclusively by the United States (Transcript, pp. 4-6).

In due course the case came on for trial in the lower court and the defendant saved all of its rights and contentions as to its non-liability by appropriate objections to testimony and

requests for instructions in its favor. All of its positions having been overruled, a verdict in favor of the plaintiff was rendered, judgment was thereupon entered, and an appeal was prosecuted to the Supreme Court of the State.

In this appeal the telegraph company contended:

1. That the possession, control and operation of its telegraph system by the United States at the time the cause of action accrued was such, under the Federal Constitution, the joint resolution of Congress and the proclamation of the President, as to prevent the maintenance of this suit against it, because such possession, control and operation on the part of the United States was in its sovereign capacity and was so complete and exclusive as to leave no ground upon which to base liability of the telegraph company, and the United States being the real party in interest, the suit could not be maintained against the United States in a State court, but, under the provisions of the Federal statutes, could only be maintained in the District Court or the Court of Claims of the United States, and

2. That the complete and exclusive possession, control and operation of its telegraph system by the United States in its sovereign capacity under the joint resolution of Congress and the proclamation of the President precluded any liability on the part of the telegraph company, for the reason that to hold otherwise would deprive the telegraph company of its property without due process of law and deny to it the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the Federal Constitution (Transcript, pp. 57-59).

All of these contentions on the part of the telegraph company were overruled, and the judgment of the lower court affirmed by a unanimous opinion of the court filed on January 26, 1920 (Transcript, pp. 59-61). In this opinion, the

court stated that the judgment was "in form against the Western Union Telegraph Company" but "in effect against the Postmaster General," and that by reason of this the telegraph company could not successfully contend that in paying such judgment it would be deprived of its property without due process of law, as it would have the right to apply to the United States for reimbursement (Transcript, p. 61).

The telegraph company immediately filed a petition for a rehearing, in which it sought to show that the court had failed to apply to the decision of the case the principles of Federal law by which it was controlled; that under the facts as found by the court, judgment could neither be rendered nor liability established against either the telegraph company or the United States, for the reason as to the telegraph company that it was not engaged in the telegraph business or in any way concerned with the transactions set out in the complaint, and as to the United States that it was the real party in interest, and suit could not be maintained against it in a State court without consent granted by Congress, which had not been done, and therefore that the judgment rendered should have been held a nullity as to both (Transcript, pp. 62-63). The telegraph company contended further in this petition for a rehearing that by the affirmance of the judgment below the court had established liability against it for the acts of the United States and had placed a lien on its property and not on the property of the United States; that the plaintiff had the right to collect such judgment by the sale of its property under the levy of an execution; that the effect of this was not only to take its property to pay the debts of the United States, but in addition to allow a third party to take such property in enforcing a liability against one in no way legally responsible for it, and that such a result deprived it of its property without due process of law and denied to it the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (Transcript, pp. 64-68).

The contentions of the telegraph company so made in its petition for a rehearing were overruled, and the petition dismissed by an order filed February 23, 1920 (Transcript, p. 69). Thereupon, the telegraph company applied to this court under the provisions of section 237 of the Judicial Code as amended by the act of September 6, 1916 (39 Stat. at L., 726) for a writ of certiorari to the Supreme Court of South Carolina. Upon consideration of such application, the writ was granted by this court on April 26, 1920, and the case comes here pursuant thereto.

Specification of Errors.

While there is no formal assignment of errors, since the case comes up by certiorari, yet logically it is essential to the determination of the existence of error in the final result of adjudication of liability against the defendant that the errors committed in reaching this result should be fully exposed, for if it be shown that the premises are without legal foundation, manifestly the deduction drawn therefrom falls for the lack of support.

As fairly appears from the record, and especially from the issues raised by the defendant, the errors so committed may be thus stated:

1. Error in holding, notwithstanding the exclusive and complete possession, control, and operation of the system of the telegraph company by the United States at the time the cause of action herein accrued and the fact that such cause of action arose out of a transaction had exclusively with the United States in the operation of such system, that this suit could be maintained and a judgment rendered therein against such telegraph company.

2. Error in holding that an individual citizen has the right to recover against the telegraph company on a cause of

action growing out of a transaction had exclusively with the United States in the operation of the telegraph system of such company while such system was in the complete and exclusive possession and control of the United States, a judgment in the State courts which will be effective and operative against the United States, when neither consent to bring nor jurisdiction to maintain in the State courts such indirect suit has ever been given.

3. Error in holding that a recovery against the telegraph company in this case does not deprive such company of its property without due process of law, and in not holding that the entire system of such company having been seized *in invitum*, the joint resolution would violate the Fifth Amendment to the Federal Constitution if it imposed liability upon such company for the acts of the United States during the period of Federal possession, control, and operation of its system, because this would make the company liable for the debts of the United States and authorize the taking of its property for the private use of persons whose real claims were against the United States and would thus deprive such company of its property without due process of law.

4. Error in holding that a recovery against the telegraph company in this case does not deprive such company of its property without due process of law, and in not holding that, the entire system of such company having been seized *in invitum* and the joint resolution of Congress not having attempted to impose any liability upon such company for the acts of the United States during the period of Federal possession, control, and operation of its system, the action of the State courts in imposing such liability upon the company would violate the provisions of the Fourteenth Amendment to the Federal Constitution, as it would compel such company to pay the debts of the United States and authorize the taking of the property of the company for the private use

of a person whose real claims were against the United States and thus deprive it of its property without due process of law and deny to it the equal protection of the laws.

The issues thus raised will be considered under three heads, to wit:

1. Federal possession, control and operation of the telegraph systems, and liability of the telegraph company thereunder (first error).

2. Federal possession, control, and operation of the telegraph systems, and liability of the United States thereunder (second error).

3. Constitutional objections to the maintenance of this suit and the recovery of a judgment therein effective against the owner telegraph company (third and fourth errors).

BRIEF OF ARGUMENT.

I.

FEDERAL POSSESSION, CONTROL, AND OPERATION OF THE TELEGRAPH SYSTEMS, AND LIABILITY OF THE TELEGRAPH COMPANY THEREUNDER.

This issue presents two aspects, viz:

1. Nature and extent of Federal possession, control, and operation of the telegraph systems pursuant to the joint resolution of Congress and the proclamation of the President.

2. Liability of the telegraph company under the joint resolution and the proclamation for the acts of the United States during its possession, control, and operation of the telegraph system.

These two propositions will be discussed in their order.

1. **Nature and extent of Federal possession, control, and operation of the telegraph systems pursuant to the joint resolution of Congress and the proclamation of the President.**

On July 16, 1918, the Congress of the United States passed joint resolution No. 834 (40 Stat. at L., 904, chap. 154; Fed. Stat. Ann., 2d ed., Supplement 1918, p. 834), which provided:

> "That the President during the continuance of the present war *is authorized and empowered*, whenever he shall deem it necessary for the national security or defense, to supervise or *to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war*, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided*, That just *compensation* shall be made for such supervision, possession, control, or operation, to be determined by the President; * * * *Provided further*, That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems." (Italics added.)

Six days thereafter, on the 22d of July, the President exerted the power thus given. Its exercise was manifested by a proclamation which, after reciting the resolution of Congress, declared:

> "It is deemed necessary for the national security and defense to supervise and to *take possession and as-*

sume control of all telegraph and telephone *systems* and to operate the same in such manner as may be needful or desirable:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby *take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.*

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General.

* * * * * * *

"From and after twelve o'clock midnight on the 31st day of July, 1918, *all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice.*" (Exhibit 2, Transcript, pp. 38-39.) (Italics added.)

The proclamation further gave to the Postmaster General plenary power to exert his authority to the extent he might deem desirable through the existing "owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems," and it was provided that they should continue the operation of the various systems "in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case might be," until the Postmaster General by general or special orders should otherwise provide.

These provisions as to the retention in the service of the

owners, officers, and employees of the companies, however, in no sense signified an intention on the part of the President to exert over the wire systems *"a mere public supervision of an operation by private owners."* On the contrary, their sole and manifest purpose was to provide for the uninterrupted operation of the systems by retaining in the service trained and competent persons to conduct the business for the Government.

Under authority of the proclamation the Postmaster General assumed possession and control of the wire systems, and on August 1, 1918, made provision for conducting the business thereof by issuing a bulletin, in which, after reciting that he had assumed possession and control, he stated that the systems should "continue operation in the ordinary course of business," and directed that "all officers, operators, and employees" of the companies would "continue in the performance of their present duties" (Exhibit 3, Transcript, p. 40).

On October 9, 1918, the President, through the Postmaster General, in carrying out the duty imposed upon him by the joint resolution to make compensation, concluded a contract with the telegraph company of the most comprehensive character, covering the whole field while the possession, control, and operation of its system by the United States continued (Exhibit 4, Transcript, pp. 41-51). By its terms, stipulated amounts were to be paid as compensation for the possession, control, and operation of the system by the United States, and the earnings resulting therefrom became the property of the United States. Although concluded in October, 1918, the contract, by its express terms, was made retroactive so as to be held effective from the time the President took over the property.

The status between the United States and the telegraph company thus created by the joint resolution and the proceedings taken pursuant thereto continued until August 1, 1919, when the wire lines were returned to their owners (Act

of July 11, 1919, 41 Stat. L., 157; Fed. Stat. Ann., 2d ed., 1919 Supp. 350). All questions as to the legal relationship resulting from such status would seem to be set at rest by the recent adjudications of this court on this and the closely analogous situation of the transportation companies.

The leading case respecting the wire companies is *Dakota Central Telephone Co. vs. South Dakota ex rel. Payne*, 250 U. S., 163 (63 L. Ed., 910), where the nature and extent of the possession and control of their properties by the United States were fully considered and determined by this court.

The case involved the right of the United States, through the Postmaster General, to fix intrastate rates on the wire lines during Federal control and operation, and it was strenuously urged in behalf of the State in denial of the existence of such a right on the part of the United States that by the resolution "only a limited power as to the telephone lines was conferred upon the President, and hence that the assumption by him of complete possession and control was beyond the authority possessed." Answering such contention this court said:

> "But although it may be conceded that there is some ground for contending, in view of the elements of authority enumerated in the resolution of Congress, that there was power given to take less than the whole if the President deemed it best to do so, we are of opinion that authority was conferred as to all the enumerated elements, and that there was hence a right in the President to take complete possession and control to enable the full operation of the lines embraced in the authority. The contemporaneous official steps taken to give effect to the resolution, the proclamation of the President, the action of the Postmaster General under the authority of the President, the contracts made with the telephone companies in pursuance of authority to fix their compensation, all establish the accuracy of this view, since they all make it clear that it was assumed that *power to take*

> *full control was conferred,* and that *it was exerted so as to embrace the entire business and the right to the entire revenues to arise from the act of the United States in carrying it out.* Indeed, Congress, in subsequently dealing with the situation thus produced, would seem to have entertained the same conception as to the scope of the power conveyed by the resolution, and dealt with it from that point of view. Act of October 30, 1918, 40 Stat. at L., 1017." (Italics added.)

The decision of the Supreme Court of the State denying the authority of the United States to fix the rates under consideration was based on its conclusion that the power of the State with reference thereto had been preserved by the proviso of the resolution saving "the lawful police regulations of the several States." Concerning this, the court said:

> "Conceding that it was within the power of Congress, subject to constitutional limitations, to transplant the state power as to intrastate rates into a sphere where it, Congress, *had complete control over telephone lines because it had taken possession of them and was operating them as a governmental agency,* it must follow that in such sphere there would be nothing upon which the state power could be exerted except upon the power of the United States; that is, its authority to fix rates for the services which it *was rendering through its governmental agencies.* The anomaly resulting from such conditions adds cogency to the reasons by which, in the *North Dakota Case,* the error in presuming *the continuance of State power in such a situation was pointed out, and makes it certain that such a result could be brought about only by clear expression, or at least from the most convincing implication.*" (Italics added.)

We would remark in passing that a similar construction had been previously given the proviso by the district court in the case of *Southwestern Tel. & Tel. Co. vs. Houston,* 256 Fed., 690.

On the same day and preceding the decision of the telephone case, this court decided the case of *Northern Pacific Railway Co. vs. North Dakota ex rel. Langer*, 250 U. S., 135 (63 L. Ed., 897), involving the right of the United States, through the Director General, to fix local or intrastate rates for transportation services. Such authority on the part of the United States was affirmed to exist, and referring to that case this court in the opening paragraph of its opinion in the *Dakota Central Telephone Company* case has this to say:

> "Involving, as this case does, the existence of State power to regulate, without the consent of the United States, telephone rates for business done wholly within the State, over lines taken over into the possession of the United States, and *which, by the exercise of its governmental authority, it operates and controls*, it does not in principle differ from the *North Dakota case* just announced (250 U. S., 135), where it was decided that, under like conditions, the State had no such power as to railroad rates. We consider this case, as far as may be necessary, by a separate opinion, however, because the authority under which the control was exerted is distinct, and because of the assumption in argument that this distinction begets a difference in the principles applicable." (Italics added.)

In the North Dakota case we find this pertinent language concerning the nature and extent of the possession and control of the transportation systems by the United States:

> "No elaboration could make clearer than do the act of Congress of 1916, the proclamation of the President exerting the powers given, and the act of 1918, dealing with the situation created by the exercise of such authority, that *no divided* but *a complete possession and control* were given the United States for all purposes as *to the railroads in question*. But if it be conceded that, despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control,

there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came, and all the other duties and exactions which the act imposed, contemplating *one* control, *one* administration, *one* power for the accomplishment of the *one* purpose, the *complete* possession by *governmental authority to replace for the period provided the private ownership theretofore existing?* This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them, which was plainly essential to the authority given, was not included in it." (Italics added.)

The case of *Burleson vs. Dempey*, 250 U. S., 191 (63 L. Ed., 929), involved the same question as to the telegraph companies. In disposing of the case the court said:

> "As there is no difference in legal principle as to the question of power between the *Dakota Central Telephone Company case* and this, it follows that the decision in that case is conclusive here and makes certain the error committed below."

In *Public Service Commission vs. New England Tel. & Tel. Co.*, 232 Mass., 465, 122 N. E., 567, which was affirmed by this court in *McLeod vs. New England Tel. & Tel. Co.*, 250 U. S., 195 (63 L. Ed., —), the Commission sued the telephone company to enforce State rates, and the company set up the joint resolution of Congress and the seizure of its lines thereunder and the operation thereof by the Postmaster General; that the United States, the President or the Postmaster General was a necessary party, and that to grant the relief prayed would in effect restrain the United States. The court, speaking through the Chief Justice, held that the United States was alone concerned, and that the effect of the congressional

and presidential action and the action of the Postmaster General was—

> *"Not a mere public supervision of an operation by private owners. It was a complete assumption of absolute and complete possession and control to the exclusion of every private interest.* No distinction is made by their terms between interstate service and intrastate service. Both alike are taken into the possession of the United States. Powers so extensive as were thus assumed can be exercised only through various governmental agencies but the right and power of the Government are paramount and admit of no associates." (Italics added.)

The same rulings have been made in the following cases:

Kansas vs. Burleson, 250 U. S., 188 (63 L. Ed., 926).

Commercial Cable Co. vs. Burleson, 250 U. S., 360 (63 L. Ed., 1030).

Commercial Cable Co. vs. Burleson, 255 Fed., 99.

Railroad Commissioners vs. Burleson, 255 Fed., 604.

Southwestern Tel., etc., Co. vs. Houston, 256 Fed., 690, and cases cited.

Mardis vs. Hines, 258 Fed., 945.

Hatcher & Snyder vs. Atchison, etc., R. Co., 258 Fed., 952.

Haubert vs. Baltimore & Ohio R. Co., 259 Fed., 361.

Nash vs. Southern Pac. Co., 260 Fed., 280.

State vs. Cumberland Tel., etc., Co., 120 Miss., 25; 81 South., 404, and 82 South., 311.

State vs. Burleson (Ala.), 82 South., 458.

Canidate vs. Western Union Tel. Co. (Supreme Court of Alabama), 85 South., 10—(not yet officially reported).

Western Union Tel. Co. vs. Wallace (Texas Court of Civil Appeals)—not yet reported.

Western Union Tel. Co. vs. Glover (Court of Appeals of Alabama)—not yet reported.

Foster vs. Western Union Tel Co. (Court of Appeals of Missouri), 219 S. W., 107.

Western Union Tel. Co. vs. Davis (Ark.), 218 S. W., 833.

Western Union Tel. Co. vs. Conditt (Texas Court of Civil Appeals), 223 S. W., 224)—not yet officially reported.

Mitchell vs. Cumberland Tel. Co., 188 Ky., 263; 221 S. W., 547.

In brief, these decisions definitely and indisputably establish two propositions respecting the status arising from the seizure, *in invitum*, of the systems of the wire companies by the United States, viz: (1) that *"it was a complete assumption of absolute and complete possession and control, to the exclusion of every private interest" and all State authority*, the resolution "contemplating *one control, one administration*, and *one power* for the accomplishment of the" governmental purpose; and (2) that in carrying on the business of such systems, the United States not only had exclusive control, but was actually *"operating them as a governmental agency."* Therefore, in the light of these controlling adjudications, there can be no question but that during the period of Federal possession and control extending from August 1, 1918, to August 1, 1919, the United States was in the *absolute, complete, and exclusive possession and control* of the systems of the wire companies and was *operating them as governmental agencies.*

2. **Liability of the telegraph company under the joint resolution and the proclamation for the acts of the United States during its possession, control, and operation of the telegraph system.**

It being conclusively established that the wire systems were in the absolute, complete, and exclusive possession and con-

trol of the United States, which operated them as governmental agencies, the question next logically arising is whether under these conditions suit can be maintained by and judgment rendered in favor of a private citizen against an owner telegraph company for an act of nonfeasance or malfeasance of the agent of the United States in the performance of his duties to the United States in the conduct of the telegraph business.

If the *possession* and *control* of the entire system by the United States was *complete, absolute,* and *exclusive,* then there was *no* possession and control left in the corporation owner, and such owner was in no way concerned with the property, and if the conduct of the telegraph business by the United States was the *operation of a governmental agency,* then the owner corporation was excluded from such operation. From these premises, the conclusion irresistibly follows that the owner telegraph company cannot be held liable to a private citizen respecting a transaction had between such citizen and the United States in the conduct of this agency of the Government, unless either expressly or impliedly made so by valid congressional or presidential action, or by force of law in existence at the time of and unimpaired by the acts of the United States in seizing its property.

The State Supreme Court in its decision expressed the opinion that authority for a recovery against the telegraph company was to be found in both the proclamation of the President and the order of the Postmaster General (Transcript, p. 61). This conclusion, however, would seem to be unfounded, for examination of the proclamation and order discloses that nothing therein contained contemplates or provides for either the maintenance or the bringing of a suit. It is true, the proclamation permits the Postmaster General to perform the duties imposed "so long and to such extent and in such manner as he shall determine through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph * * * systems," and con-

tinues these in the operation of the business in the usual and ordinary course until the Postmaster General shall by general or special order otherwise provide (Transcript, p. 39). The order of the Postmaster General issued in assuming possession and control of the systems merely carries out the authority granted to him by the proclamation as to the operation thereof by retaining the officers, operators, and employees in the service and entrusting to them the duties of actual operation (Transcript, p. 40).

The evident purpose of the authority so granted and exercised was, as we have already said, to prevent any interruption in the business by having it conducted by trained and competent men, but they were *none the less agents and employees of the United States* engaged in a business *exclusively* and *completely* in the *possession and control of the United States*. Hence, no basis for the asserted liability of the telegraph company can be found either in the proclamation of the President or the order of the Postmaster General.

Nor can any basis for liability against the owner corporations be found in the joint resolution which authorized the seizure of their properties. In fact, this joint resolution gives no permission to sue either the corporations or the Postmaster General. It is true that by a proviso the joint resolution saved "the lawful police regulations of the several States," but as we have already seen, this court, in the *Dakota Central Tel. Co. case*, held that this provision had reference only to "State power to deal with the health, safety, and morals of the people," and that the systems of the telephone and telegraph companies had been taken into a sphere where Congress had complete control over the lines, *"because it had taken possession of them and was operating them as a governmental agency."* Under this state of facts, the court said that "it must follow that in such sphere there would be nothing upon which the State power could be exerted except upon the power of the United States" and that the anomaly of allowing the State a right of operation on the power of the

General Government was such a result that "could be brought about only by clear expression or at least from the most convincing implication." Neither clear expression nor convincing implication was found in the resolution to authorize interference by the State with the making of intrastate rates by the Government during the period of its control and operation; neither is there clear expression nor convincing implication to be found in the resolution allowing suits against the owner telegraph corporations for acts of the Federal Government in operating their properties, and if in the one case such a power was denied as being neither expressed nor implied, it necessarily follows that for the same reasons it must be denied in the other.

The soundness of this conclusion is further demonstrated by a comparative examination of the action authorizing and providing for Federal control of the railroad lines. In the proclamation of the President of December 26, 1917, taking possession of these lines, it was distinctly provided that suits might be brought against the carriers and judgments rendered as theretofore until the Director General by general order should otherwise determine. Thereafter, on March 21, 1918, Congress passed an elaborate Federal control act relating to these carriers (40 Stat. at L., p. —, Fed. Stat. Ann., 2d ed., 1918 Supp., p. 757), section 10 of which expressly provides:

> "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it which was not so transferable prior to the Federal control of such carrier."

Leaving out of view for the present all questions as to the constitutionality of this provision, the point to be emphasized is that *neither the joint resolution granting nor the proclamation exerting the authority to seize the wire systems contains anything analogous thereto.* On the contrary, they are absolutely silent both as to the liability of the owner corporations and of the United States; and equally silent respecting the right to bring and maintain suits. Nor was this silence the result of accident. On the contrary, it was the result of deliberate design, for, as appears from the discussions in the Senate when the joint resolution was adopted and when the act providing for the return of the wire systems to their owners was under consideration, the question of incorporating in each a provision similar to section 10 of the Federal railroad control act, *supra*, was fully considered and intentionally omitted. These discussions appear in the Congressional Record of July 13, 1918, and of June 10, 1919, respectively, and the relevant portions thereof will be found fully set out in the Appendix hereto as Exhibit A. So that there is no room for contending that while the joint resolution does not expressly attempt to fix liability on the owner corporations, yet impliedly, at least, this must have been the intention of Congress, for the reason that such contention is utterly incompatible with what was deliberately and designedly done by Congress in refusing to make such a provision a part either of the joint resolution or of the subsequent act returning the properties.

Following the passage of the Federal control act of March 21, 1918, the Director General of Railroads issued, pursuant thereto, a number of general orders, which were approved before issuance by the President, and in which, while distinctly recognizing the right of suit, he directed that all suits must be brought against the Director General and *not against the owner corporations.* The reason for this is thus given in the preamble to the Director General's General Order No. 50:

> "Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control, for which the said carrier corporations are not *responsible*, and it is right and proper that the actions, suits, and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control, should be brought directly against the said Director General of Railroads and not against said corporations." * * * (Then follows an order directing the suits to be brought against the Director General and not otherwise.) (Italics added.)

In the case of *Schumacher vs. Pennsylvania Railroad Company*, 106 N. Y. Misc., 564; 175 N. Y. Supp., 84, the court holds that section 10 of the Federal control act, authorizing suits against carrier corporations during the period of Federal control on causes of action arising during such control, violates the Fifth Amendment to the Federal Constitution, and that the foregoing order of the Director General, stating that the carriers were not responsible for these causes of action, was designed to remove such constitutional objection. At page 91 we find this language:

> "It is safe to assume that the Director General of Railroads would not have issued the order in question, except upon the advice and after consultation with the highest legal advisers of the Government, and that it was promulgated only after the most careful and mature consideration of the constitutional and legal questions presented. We are safe, we think, in concluding that the order represents the considerate judgment of the Government authorities on the questions we have been considering in this opinion."

Whether a provision in the act granting authority to take over the lines similar to that found in section 10 of the Federal control act, *supra*, fixing liability on the owner corpora-

tions for the acts of the United States, would be constitution
is a question we reserve for subsequent consideration. Su
fice it to say at this stage that no such provision, either e
pressly or impliedly, exists; hence so far as congressional
presidential action is concerned, the liability of the telegra
company depends on the status created by the seizure of
of its properties by the United States. As was held by th
court in the *North Dakota case*, *supra*, this status was "
divided but a *complete* possession and control" by the Unit
States "for all purposes," "contemplating *one* control, *o*
administration, *one* power for the accomplishment of the *o*
governmental authority to replace for the period provided t
private ownership theretofore existing," thus affording
room for contending that the telegraph company as such ha
any control whatever over either the system or its operatio
Nor is this result altered in the least degree by the fact th
the operators and agents who handled the messages involv
herein were originally the employees of the telegraph co
pany. At this time they were solely and exclusively t
agents of the United States, and the telegraph company ha
been completely excluded from all connection with the pro
erties. Hence, instead of finding congressional or preside
tial action either expressly or impliedly asserting liabili
against the owner corporations, we find such action negati
ing such liability by creating a status, the nature and effe
of which was to take the systems absolutely away from the
owners and exclude such owners from any participation
their operation. The instant case is therefore governed
the principles of the *North Dakota case* and the *Dakota C*
tral Telephone Company case, under which principles neith
can liability be predicated nor recovery had against the te
graph company for the negligent or wilful acts of the e
ployees of the United States in their conduct of the telegra
business.

The conclusion thus reached as the result of independe
reasoning is fully supported by numerous recently decid
and well-considered cases.

In *North Dakota vs. Northwestern Telephone Exchange Co. et al.* (U. S. Dist. Ct., North Dakota), — Fed., — (not yet reported), a bill in equity was filed by the State to enjoin the collection of intrastate telephone rates promulgated by the Postmaster General. The corporation moved to dismiss the bill as to it, which motion was granted, the court, by Judge Amidon, saying:

> "In the case of the telephone companies there is *no reservation in the joint resolution* of Congress authorizing the President to take over telegraph and telephone lines, *permitting either the companies or the Postmaster General to be sued, nor is any such permission contained in the proclamation of the President.* The acts of the National Government in regard to telephone and telegraph lines in this particular are wholly different from the statute that was passed authorizing the taking over of railroads. By section 10 of that statute full provision is made in regard to suits against the companies and clothing the Interstate Commerce Commission with power to supervise any changes in rates made by the President or under his authority while the railroads remain in his control. As *no such permission* is contained in the joint resolution and the proclamation of the President in regard to the telephone and telegraph companies, it seems to me that *the general principle must hold, and that is, that no suit can be brought in respect of those properties while they are so held either by the State or by any officer acting under authority of the State.*" (Italics added.)

The case of *Railroad Commissioners vs. Burleson et al.*, 255 Fed., 604, likewise sought to enjoin the putting into effect of a schedule of intrastate telephone rates. The court refused the injunction, and held that the owner telephone corporation was "not responsible for the regulations" of the United States, was "not a proper party to the bill and as to it, the bill should be dismissed."

This precise question of the liability of the owner tele-

graph corporation on transactions had between the public and the United States in the operation of its system has been recently presented to and passed upon by the courts of Alabama, Arkansas, Kentucky, Missouri, and Texas, and each of these courts has declared that suit cannot be maintained against the telegraph company.

The case of *Canidate vs. Western Union Tel. Co.* (Supreme Court of Alabama), 85 South., 10—not yet officially reported—was a suit against the corporation to recover damages for the failure, during Federal operation, to transmit a telegram. Ruling that the action would not lie, the Supreme Court of Alabama said:

> "The *complete* control and the *exclusive* possession of this, as well as all other wire lines within the resolution of Congress, as effected through the proclamation of the President, having passed to the United States, the defendant (appellee) was not and could not have been engaged in the business described in the complaint except, and that only, under the *derivative* authority, a mere agency, imposed upon the telegraph company by the paramount governmental processes set forth in the plea, to the end that whatever service the physical properties and the company's personnel might render in the transmission of intelligence by wire should be and was a public, governmental service or function, to or in respect of the discharge of which,—within the realm of the company's legitimate activity under the complete control and exclusive possession of the Government,—*neither the company*, as such, nor the persons so serving in the operation of any of the functions of the company so dominated, were *subject to individual corporate or personal liability to third persons for a breach of a contract or for a tort* (the breach of a public duty) *predicated alone on a contract for the transmission of intelligence by wire.*" (Italics added.)

Western Union Telegraph Co. vs. Wallace (Texas Court of Civil Appeals)—not yet reported—was an action to recover

for mental anguish alleged to have resulted from delay in the transmission of two telegrams on the 20th and 21st of October, 1918. The judgment for the plaintiff in the court below was reversed, the court using this language:

> "It can hardly be seriously contended that if the Government of the United States, either by lawful means or by force, dispossessed appellant of its telegraphic system and operated the same *through and under the direction of the officers, agents, and employees of the Government, appellant could be held liable for any wrongful act of the Government* whereby another suffered injury. This is true regardless of whether or not appellee has a remedy for the wrongs committed by the Government resulting in injury to him. *Schumacher vs. Ry. Co.*, 175 N. Y. Supp., R., 84; *Edwards vs. Jones*, 12 Daly, N. Y., 415. *By what process of reasoning can it be held that appellant can be held liable for the acts of the Government over which it had no control whatever? Can it be thought that where one person takes property of another, without his consent, and against his protest, and thereafter wrongfully uses the same so as to bring about damage to a third person, such third person can recover against the owner such damages so suffered, solely because such third person has no remedy against the wrongdoer?"* (Italics added.)

After reviewing the congressional and presidential action, the action of the Postmaster General, and after considering the *North Dakota* and the *Dakota Central Telephone Co. cases*, the court concluded:

> "Having reached the conclusion that no liability is shown against appellant, the judgment of the trial court is reversed and judgment is here rendered for appellant."

This case has been followed in the subsequent case of *Western Union Tel. Co. vs. Conditt* (Texas Court of Civil Appeals), 223 S. W., 224—not yet officially reported.

The next case is *Western Union Telegraph Co. vs. Glover* (Court of Appeals of Alabama)—not yet reported—which was an action for breach of contract in failing to deliver a telegram promptly. The plaintiff recovered judgment, which was reversed on appeal, the court ruling:

> "Whatever contract was made with reference to the message, was with the manager of the telegraph office at Selma, Alabama, November 14, 1918, at a time when all of the defendant's property was in the possession of the United States Government, and the defendant corporation, together with all of its operators were under the direction and control of the Federal authorities, acting under the powers conferred by Congress by joint resolution July 14, 1918, and the proclamation of the President, July 22, 1918. * * * But whatever services were being rendered by the corporation to the Federal Government, *it was no part of its duty to make contracts for the transmission of messages. This service had been assumed by the Government itself and was being carried on by its employees and agents* in charge of the local officers who acted under instructions, not from the corporation, but from the Postmaster General. Under these circumstances telegraph services and facilities afforded the public by the Government during the period of its control, were afforded, not as a matter of right which the public could demand, but as a matter of discretion on the part of the Government and as to which, *the corporation was in no way concerned.* In other words, when the Postmaster General, acting under the law, took possession of the physical properties of defendant and control of the defendant, the defendant became the agent of the Government subject to instructions, just as any other instrumentality drafted for service during the war. True, it maintained its corporate existence, but certain of its powers were suspended, and it retained no control over its property or employees, except subject to the orders of the Government. *Dakota Cent. Tel. Co. vs. South Dakota,* Vol. 39, Sup. Ct. Reporter, 507.
>
> "This being the law, the plaintiff as well as every

one else was charged with knowledge and hence it cannot be claimed he was dealing with an agent who did not disclose his principal. Being an agent of the Government, even if it did make the contract sued on, the contract was public and not personal. *Hodgson vs. Dexter*, 1 Cranch (U. S.), 345. Being a public and not a private contract it imposes no personal liability." (Italics added.)

In the case of *Foster vs. Western Union Telegraph Co. et al.* (Missouri Court of Appeals), 219 S. W., 107, the question arose and was decided in favor of the company, the court saying:

> "*No suit could possibly be instituted against the Western Union Telegraph Company, because* it has been expressly held by the highest authority that when the President, acting under the power given him by Congress, took charge of the telegraph lines of the United States, *such lines were then operated as a Government agency* * * *
>
> "The judgment in this case is clearly erroneous and without foundation of law, and must be reversed." (Italics added.)

The next case is *Western Union Telegraph Company vs. Davis* (Supreme Court of Arkansas), 218 S. W., 833, wherein the lower court allowed a recovery for mental anguish alleged to have resulted from delay in the transmission and delivery of a message, which was reversed by the Supreme Court of Arkansas, which said:

> "Appellant pleaded the complete control of the Government over the physical properties of the company in the operation of the telegraph business as a defense against any liability which accrued by reason of negligence during such Government control and operation.
>
> "The question presented by this plea is the sole question involved in the case, and the contention now is that the telegraph company is not liable for damages caused by the servants of the Government in op-

erating the lines, and that there is no authority under the Federal law for maintaining an action against the telegraph company for a cause of action which arose under Government control.

"We are of the opinion that this contention is sound and must be sustained.

"Learned counsel for appellee defend the judgment below under authority of the proviso in the Federal statute which preserves the authority to the States in the exercise of 'lawful police regulations.' The argument is that the liability imposed on telegraph companies for damages by way of mental anguish resulting from negligence in the transmission of messages is in the nature of a police regulation, the vitality of which is preserved in the Federal statute.

"This contention overlooks, however, the decision of the Supreme Court of the United States in the recent case of *Dakota Central Telephone Co. vs. State of South Dakota*, 250 U. S., 163; 39 Supp. St., 507; 63 L. Ed., 910, which interprets the language of the joint resolution of Congress and gives a definition to the term 'police regulations'; that it means the exercise of the police power of the State in a restricted sense, limiting it to that phase of the power which deals with 'health, safety and morals,' and not in the comprehensive sense which embraces the substance of the whole field of State authority. *The assumption of control by the Postmaster General was complete, and constituted a substitution of the Government for the owners of the telegraph lines in the operation of the same. The possession and control of the owners was entirely displaced, and the act of negligence complained of was committed, not by the servants and employees of the telegraph company, but by the servants and agents of the Government. There was no liability resting upon the telegraph company for the act of the Government and no such liability was created by statute.* * * *

"We see no escape from the conclusion that there is no liability in this case for the injury complained of. The judgment is therefore reversed, and the action dismissed." (Italics added.)

The question came before the Kentucky Court of Appeals in *Mitchell vs. Cumberland Telephone, etc., Co. et al.*, 188 Ky., 263; 221 S. W., 547, which was a suit to recover for personal injuries received by plaintiff while assisting in unloading some telephone poles from a car, and liability was held not to exist, the court, after a full review of the cases, saying:

> "As said in the cases, *supra*, if suits of this kind could be maintained under the circumstances, then indeed could property be taken without *any* process of law, since the only pretended claim to it would be that the defendant owned the property which was being operated at the time of the happening of the injury sued for though it was then entirely out of his control and was taken without his consent. The fact that the plaintiff might be remediless because there is no provision for any suit against the United States (although regrettable) cannot strengthen his case. Numerous instances exist in this State where there is no remedy furnished for similar injuries. No county can be sued for negligence in the maintenance of its public roads; nor can a municipality, however negligent, be made to respond in damages for injuries inflicted while exercising a governmental function. In neither of those cases is there as potent reasons for withholding liability as exists in this case.
>
> "The case of *Witherspoon & Sons vs. Postal Telegraph & Cable Company*, 257 Fed. Rep., 758 (decided by the United States District Court for the Eastern District of Louisiana), relied on by appellant is the only one announcing a contrary view, and it is expressly discarded by some of the cases, *supra*, and was decided before the opinion of the Supreme Court was rendered in the Dakota case. We do not, therefore, regard it as authority.
>
> "From the foregoing authorities there seems to be no alternative but to affirm the judgment, which is accordingly done."

Notwithstanding the broader scope and the more elaborate provisions, including one respecting suits, of the congressional legislation and the action pursuant thereto in respect

to the transportation lines, the Federal decisions on Federal control of railroads all establish the non-liability of the corporations for the acts of the employees of the Director General. Hence they strongly sustain the position that the wire companies cannot be held liable for the acts of the employees and agents of the Postmaster General in his operation of the properties for the United States. Reference will be made to a few of these decisions.

Thus in *Rutherford vs. Union Pacific R. Co.*, 254 Fed., 880, we find this statement:

> "It would have been an anomaly to have given the actual control of the railroads to the Director General, and to have provided that suits arising out of his acts should be brought against the corporations who had been divested of authority over those acts."

And in *Mardis vs. Hines*, 258 Fed., 945, the court says:

> "From the time that the proclamation of the President became effective on December 28, 1917, the Director General as the representative of the President has been in the exclusive possession and control of the railroad. The railroad company exercises no control whatever. The railroad is operated under the orders of the Director General. The railroad company has nothing to do with such operation. When the Director General assumed control all the employes on the railroad ceased to be employes of the railroad company and became employes of the Director General. At that time the relation of master and servant ceased to exist between the employes operating the railroad and the railroad company. That relation then began and still exists between such employes and the Director General.
>
> * * * * * * *
>
> "In my opinion the judgment sought to be recovered against the railroad company is inconsistent with the acts of Congress and the order of the President."

Again, in *Hatcher & Snyder vs. Atchison, etc., R. Co.*, 258 Fed., 952, we find this ruling:

> "Since the opinion in the North Dakota case there is no further doubt as to the extent of the power given the President by the congressional acts. * * * We know, as a matter of public information, that the construction there given as to what was intended by Congress should be done has in fact been done. The railroad companies have been entirely excluded from participation in the operation of their properties. They receive none of the income from them. It goes to the Government. They have no voice in the employment and discharge of men engaged in the upkeep and repair of their roads and rolling stock, and the operation of trains. All of their properties, of every kind, needful for transportation purposes have been taken over by the Government, and their possession and operation rest in the exclusive control of the Director General."

Further, on page 954, the court says:

> "*Certainly there is no power in Congress to make A liable and suable for the acts of B. Fundamental principles of justice cannot be overturned by legislative fiat, to say nothing of constitutional guarantees.* Non-liability of the company was sustained at *nisi prius* in *Schumacher vs. Pennsylvania R. R. Co.*, 175 N. Y. Supp., 84. The construction of the act there given is in accord with that in the *Dakota* case, and the reasoning on which the conclusion was reached appears to me sound." (Italics added.)

In *Haubert vs. Baltimore & Ohio R. Co.*, 259 Fed., 361, it is said:

> "It is now conclusively settled that complete possession and control of all such railway lines as are under Federal control, and not a divided possession and control, have been transferred to the United States by virtue of the act of August 29, 1916 (Comp. Stat., sec. 1974*a*), the proclamation of the President

of December 26, 1917 (Comp. Stat., 1918, sec. 1974*a*), the act of March 21, 1918 (Comp. Stat., 1918, sec. 3115¾*a*, and following sections), and the President's proclamation of March 29, 1918. It seems equally clear that *all liability for all actions of the Director General of Railroads during Federal control is imposed upon the United States, and does not remain upon the railroad company*, which has thus been entirely ousted from the possession, control and operation of its property.

"All moneys and other property derived from the operation of railway lines under Federal control are the property of the United States.

* * * * * * *

"Manifestly it seems to me that in view of these conditions *no liability exists against the railroad company itself for a personal injury due to operation under Federal control*, and that no judgment can be rendered therefor which will become a lien upon the corpus of its property or payment compelled therefrom." (Italics added.)

And on page 364:

"My conclusion is that *liabilities due to operation by the agencies having possession by virtue of the acts creating and authorizing Federal control are not liabilities of the railroad companies that have been ousted from such possession and control, that suits cannot be brought against such companies and prosecuted to judgment against them*, and that such claimants are limited to a right of action against the Federal control agency and to such sources of payment as are provided by the Federal Control Act." (Italics added.)

Again, in *Nash vs. Southern Pacific Company*, 260 Fed., 280, we find, quoting from page 284:

"As the terms of the act at once disclose, it was the purpose and intent of Congress that the possession

and control of the systems of transportation taken over in whole or in part by the President was to be an *exclusive one, to no extent shared in by the owners.* If the latter or their officers were retained as operators, they were to act merely as servants and under pay of the Government; and while the owners were to be compensated for the use of their properties, everything earned or accruing from their operation in excess of such compensation was to be the property of the Government. Such a taking involved in no sense the element of agency by the Government for the owners. Agency implies a consentual or contractual relation, but this was not such. It was more nearly analogous or akin to a *taking* by the sovereign *in the right of eminent domain;* and *the result of such a taking was necessarily to relieve the owners of systems so taken from any legal responsibility to the public arising out of their operation,* and quite as necessarily an assumption of such responsibility by the Government." (Italics added.)

And on page 287:

"But that it was intended as the purpose of section 10, as urged by plaintiff, to authorize suits against the owners of these properties in causes of action arising out of transactions had with the Federal Railroad Administration, or through torts committed by its agents while under its control—things for which, we repeat, the owners could be in no way responsible—may not for a moment be indulged; such a construction would clearly render the provision obnoxious to the objection of authorizing the taking of property without due process of law, a purpose which may not be imputed to Congress."

Finally, in *Westbrook vs. Director General,* 263 Fed., 211, it is said:

"The effect of the President's action and this act was not to take over the corporate owners of the transportation systems or their franchises, but only their properties. *Postal Telegraph Co. vs. Call,* 255 Fed.,

850; — C. C. A., —. The persons who had been officers and employes of the owning companies ceased in general to be such and became agents and employes of the Director General. Service of process upon them no longer bound their former employers. *Southern Cotton Oil Co. vs. A. C. L. R. R. Co.* (D. C.), 257 Fed., 138; *Wood vs. Clyde S. S. Co.* (D. C.), 257 Fed., 879. The Federal control was exclusive and complete. *Northern Pacific Railroad Co. vs. North Dakota*, 250 U. S., 135; 39 Sup. Ct., 502; 63 L. Ed., 897. Plainly, therefore, railroad operations became those of the United States, no matter in whose name carried on. They were for months carried on over each line of railroad in the name of its owner, but these names were all aliases of the United States. The inevitable confusion of names with rights occurred, and the Director General issued his General Orders 50 and 50*a*, directing suits to be brought against his official title, and providing, perhaps unnecessarily, for service on his agents.

"Since the owning companies could no longer control, the railroad officials and employes were not their agents, and *the companies could not be held for their acts. Brady vs. C. & G. W. R. R. Co.*, 114 Fed., 100, 105, 107; 52 C. C. A., 48; 57 L. R. A., 712. The United States owned what was earned, and they alone could be treated as the business operator of each railroad." (Italics added.)

In the case of *Erie R. Co. et al. vs. Caldwell*, 264 Fed., 947, which was a joint suit against the railroad company and the Director General, the railroad company moved for a directed verdict in its favor at the close of the evidence, which motion was refused. On writ of error, the Circuit Court of Appeals reversed the ruling, saying:

"The trial court should have sustained this motion and dismissed the Erie Railroad Company from the suit. *The Director General of Railroads having lawfully taken full possession and control of this company's property, the company itself could not be held liable for negligence resulting in injury to employees*

or others during the time its property was being operated by governmental agencies over which it had no control." (Italics added.)

Our research discloses only two cases asserting the right to sue and recover against the wire corporations on causes of action accruing during the period of Federal control, viz: *Witherspoon vs. Postal Telegraph, etc., Co.*, 257 Fed., 758, and *Spring vs. American Telegraph, etc., Co.* (W. Va.), 103 S. E., 206.

The *Witherspoon* case was a suit for damages for delay in delivering a cablegram. The court recited that the President's proclamation directed that the corporation's employees should continue the operation of the lines in the usual way in the names of the owners or managers, as the case might be, and admitted that neither in the joint resolution nor the proclamation of the President was there a provision similar to section 10 of the act of March 21, 1918, taking over the railroad systems of the country, but said:

> "It seems to me, however, that it was the intention of Congress, in authorizing the President to take over the lines, that the companies should go ahead with private business the same as theretofore. This would contemplate the institution and defense of suits. If the company is allowed to take and send private messages, there should be some method of holding it liable for damages occasioned through negligence, notwithstanding the Postmaster General had the direction and control of the company. See *Postal Tel. & Cable Co. vs. Call*, Dist. Judge, 255 Fed., 850. — C. C. A., —.
>
> "The joint resolution provides for just compensation to the companies and the method of settling disputes as to same between them and the Government. If the companies are held for damages occasioned while under Government control, compensation will certainly extend to reimbursement. In the meantime litigants should not be delayed in liquidating their claims. Therefore I think it proper that the plaintiff

> in this case should be allowed to establish his liability against the company, if there is any. Delay in the trial of the case may result in hardship to either side."

At the outset, we direct the court's attention to the fact that the case relied on, *Postal Telegraph-Cable Company vs. Call*, 255 Fed., 850, in no way supports the conclusion reached. That case was an application for a mandamus against a United States district judge to require him to hear and determine a controversy between a telegraph company and a railroad company for the condemnation of a right of way for a telegraph line upon and along the right of way of such railroad company, the condemnation proceeding having arisen subsequent to Federal control. The Circuit Court of Appeals for the Fifth Circuit directed the mandamus to issue. In the course of its opinion, the court expressed the view that under section 10 of the Federal control act, a plaintiff had a right to recover a judgment against a carrier company. This construction was subsequently distinctly repudiated by the action of the Director General in promulgating General Orders 50 and 50*a* and, as shall be later shown in this brief, it leaves out of view entirely the constitutional objection to giving such meaning to the act. But aside from all this, section 10 *did make provision for suit*, while the joint resolution contains no such authority, hence a construction based on a statute of one kind is totally inapplicable to a statute of a wholly different nature.

The opinion in the *Witherspoon case*, which, as a matter of fact, attempts no real discussion of the issues, is based on two assumptions, viz: (1) that the company accepted the message, and (2) that it was the intention of Congress in authorizing the taking over of the lines "that the companies should go ahead with private business the same as theretofore." If these premises are sound, the conclusion deduced therefrom as to the right to bring suit respecting matters involved in the business so privately conducted by the com-

panies may also be sound. But what the premises really assume is that the status existing between the wire companies and the United States by virtue of the congressional and presidential action was a "mere public supervision of an operation by private owners," and not a "complete assumption of absolute and complete possession and control" by the United States, "to the exclusion of every private interest." When this court in the *North Dakota case* and the *Dakota Central Telephone Company case* denied the theory of a supervised private control and asserted the fact of a complete, absolute, and exclusive possession and control by the United States, it swept away the entire basis of the decision, because a company that had been excluded from every vestige of control over and all participation in the operation of its system not only did not and could not accept a message for transmission, but did not and could not conduct the telegraph business. Hence, when the premises fail, the conclusion deduced therefrom must likewise fail.

This view of the value of the case as a precedent, in the light of the rulings of this court above referred to, finds judicial sanction in *Candiate vs. Western Union Tel. Co., supra*, and *Mitchell vs. Cumberland Tel. & Tel. Co. et al., supra*.

The additional deduction made by the court in the *Witherspoon case* from the provision in the joint resolution as to compensation to the companies, that the corporations whose lines were seized might be held liable for the acts of the employees of the United States, and would presumably receive reimbursement from the Government for any damages paid upon such judgments, is wholly illogical. It is settled by an unbroken current of decisions of this court, to which we shall have occasion hereinafter to refer, that the sovereign is exempt from suit, except where consent to bring such suit has been expressly granted by Congress. Therefore, if the Government itself is not suable under the joint resolution, the corporation held liable for the act of the Government's em-

ployee would have no right of action against the Government. The immunity of the Government from suit would extend equally to suit against it by the corporation which paid damages to an individual for an act of the employee of the Government in the control and operation of such corporation's property, and for the simple reason that Congress has not seen fit to grant in the joint resolution such right of suit against the Government; and if the Government be immune from suit, how could the corporation obtain reimbursement from the Government through a settlement of accounts of the Government's transaction of business on the corporation's lines? In such accounts the corporation could assert no claim against the Government not enforcible by law.

In the acts taking over and providing for the operation of the railroads, express provision, as we have seen, was made for the bringing of suits against the owner corporations; yet by administrative order fully authorized by the legislation, this provision was deliberately superseded, for the reason, as declared therein, that such corporations could not be *responsible* for the acts of the United States. But if the transportation corporations could not be held *personally responsible* for the acts of the Government where an act of Congress expressly declared they could be so held, how can the wire companies be held *personally responsible* therefor under a statute that not only does not, but, as we have seen, it was deliberately intended should not, make them so liable? Liability cannot be created by legislation by implication if it cannot exist by legislation expressly enacted; hence, we cannot have the anomaly of a right of action against the wire companies impliedly existing, notwithstanding the silence in reference thereto of the legislation authorizing the taking of their properties, and no right of action against the transportation companies, even though expressly provided for in the legislation taking over and directing the control of their properties. These considerations render further discussion of the

Witherspoon case unnecessary, as they fully demonstrate its unsoundness.

The other case *contra, Spring vs. American Telegraph & Telephone Co.*, was a suit to recover damages for an injury to plaintiff's automobile, resulting from a collision with one of defendant's motor trucks on a highway, which the complaint alleged was due to the negligence of the defendant, through its agents, in the management of the truck. The defendant demurred to the complaint on the ground that at the time of the accident its entire system was in the possession of and being operated by the United States, and hence no liability existed against it. The demurrer was overruled, and on appeal this ruling was sustained. In the course of the opinion, reference was made to the exclusiveness and completeness of Federal control of the systems as established by the *North Dakota case* and the *Dakota Central Telephone Company case*, and to the fact that predicating their rulings thereon, the courts of Arkansas, Alabama, and Texas, respectively, in *Western Union Tel. Co. vs. Davis, supra; Canidate vs. Western Union Telegraph Co., supra*, and *Western Union Tel. Co. vs. Wallace, supra*, had denied liability of the corporation for negligent delay in transmitting telegrams during such control. The court then stated that as the wrongs there complained of *grew out of transactions directly involved in Federal operation*, these decisions were perhaps sound, but that they were inapplicable to a case against the corporation for an injury inflicted by it in the use of its property during Federal control. As the facts of the instant case bring it within the class of cases directly referred to as arising out of Federal operation, and as the court refused to rule on the soundness of the cases denying the right to sue the corporation under such conditions, the *Spring case* may properly be regarded as having no application.

The case was heard on a demurrer to a complaint which alleged use of the motor truck in construction, maintenance, and repair, and the only point really decided was that there

was nothing to show that the truck was not rightfully acquired by the corporation *subsequent to the seizure of its properties* by the Government, and was not being rightfully used by it in and about its own *independent* business when the accident happened. Obviously, this is no holding that the corporation was liable for a transaction involved in Government *control and operation*, but only a holding that if the corporation, which did not cease to be an entity when the Government took over its property, afterwards acquired other property and by means of it inflicted injury while about its own independent business or while trespassing upon the domain of the United States, it would be liable therefor. It may well be that the court, in view of the fact that the proclamation took over not only the systems, but all "equipment thereof and appurtenances thereto whatsoever," and the further fact that a corporation without either business or the means of doing business would not likely be engaged in any kind of work with a motor truck for which it could be liable, was wholly unwarranted in the presumptions it indulged to save this complaint from demurrer; yet conceding that it action in this regard can be sustained, still it is no authority whatever for a recovery under the circumstances of the present case.

Neither the congressional nor the presidential action therefore, affords any warrant, either express or implied, for holding the owner wire corporations liable for the acts of the employees and agents of the United States while the systems of such corporations were in the possession and control of and being operated by the United States.

But the conclusion thus reached, that the asserted liability is not supported by anything found in either the congressional or the presidential action, does not finally dispose of this branch of the case. Indeed it has been contended, or at least assumed, in some quarters that the wire corporations being common carriers existing and operating by virtue of State laws at the time the United States commandeered the

properties, owed such a duty to the public of the States in which they existed and operated that they could not be rendered exempt by any action of Congress and the President from liability to the public for the acts of the Government of the United States while such Government possessed, controlled, and operated their systems. Predicating the argument on this supposed absolute duty and responsibility to the public inherent in the very nature and constitution of a common carrier, it is reasoned that the relation between a wire corporation and the United States resulting from the taking over of its properties was that of lessor and lessee, principal and agent, or something similar, and that in any event the liability of the corporation for the acts of the United States is absolute. This was the view of the learned trial judge in the court below, as will be seen by reference both to his reasons given for refusing to direct a verdict and to his charge to the jury (Transcript, pp. 52-53). The unsoundness of these views can best be demonstrated by first considering the basis on which they rest, viz: the supposed absolute duty of a common carrier as a State corporation to render at its own responsibility service to the public and the asserted want of Federal power to alter or interfere therewith; for if this be unsound all the deductions made therefrom are likewise unsound.

We freely concede that both telegraph and telephone companies are common carriers, having been expressly made so by section 1 of the Interstate Commerce act as amended by the act of Congress of June 18, 1910 (36 Stat. at L., 544). We further concede that when a telegraph company is chartered by a State or being chartered is authorized to do business therein, and it actually engages in such business, it, as a common carrier, owes a duty to render adequate and prompt service to the public without discrimination, and public policy forbids that it be allowed to divest itself of its responsibility in this regard created by virtue of its franchise, and shift it either to its lessee or to its agent. But while

such is the measure of the responsibility of a telegraph company as a common carrier and the extent of its powers in respect to actions taken of its *own volition*, yet it must be quite obvious that they have no application where the common-law duty and the corresponding common-law liability are not sought to be either evaded or avoided by the *voluntary* act of the common carrier, but have both been either displaced or suspended for the time being by the action of the United States as the paramount sovereign exerting its constitutional powers in time of war.

To assert that the obligations and responsibilities of a common carrier so inseparably inhere in its very being that the power of the United States is not such as to reach to and suspend or supplant them is but to deny the supremacy of the United States over these agencies created by State action. But under article 1, section 8, of the Constitution, Congress is not only given the power "to declare war" and "to raise and support armies," but also "to make all laws which shall be necessary and proper for carrying into execution" these powers. Hence, during the existence of war, Congress, under the Constitution, possesses plenary power to use in the common defense the entire resources of the nation, both of men and materials, and no State possesses the authority to create an entity and impose upon it such duties and obligations as to place its properties beyond the reach of this constitutional war power of the United States. But if the United States exerts the power to reach out and seize, *in invitum*, the system of any common carrier corporation created and existing by virtue of State law, and to use it in the national defense, necessarily by such exertion it reaches to, and suspends and supplants for the time being, the duties and obligations owed by such common carrier to the public, for it is inconceivable that these should still subsist when all ability to discharge them has been taken away under paramount authority.

These conclusions are fully vindicated by the decisions of

this court. Thus, in the separate opinion of Chief Justice Chase in *Ex parte Milligan*, 4 Wall., 2 (18 L. Ed., 281), it is said:

> "Congress has the power, not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. * * *
>
> "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise."

Again, in the *Legal Tender Cases*, 12 Wall., 457 (20 L. Ed., 287):

> "It is absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the sword and the purse, and the right to wield them without restriction on occasions of national peril. In certain emergencies government must have at its command, not only the personal services—the bodies and lives—of its citizens, but the lesser, though not less essential, *power of absolute control over the resources of the country*. Its armies must be filled, and its navies manned, by the citizens in person. Its material of war, its munitions, equipment, and commissary stores, must come from the industry of the country." (Italics added.)

Virtually this same denial of national power to displace State authority respecting the duties and responsibilities of common carriers was made in all of the cases involving the right of the United States, while possessing and operating

their systems, to make and enforce intrastate rates, and was conclusively answered by the unanimous judgment pronounced by this court in the *North Dakota case, supra*. There it was argued that since State control over rates was the rule prior to Federal control, the statute must be interpreted in the light of a presumption that no change in State control had been made. Answering such contention, this court said:

> "The presumption in question but denied the power exerted in the adoption of the statute, and displaced by an imaginary the dominant presumption which arose by operation of the Constitution as an inevitable effect of the adoption of the statute, as shown by the following:
>
> "(*a*) The complete and undivided character of the war power of the United States is not disputable. *Selective Draft Law cases* (*Arver vs. United States*), 245 U. S., 366; 62 L. Ed., 352; L. R. A., 1918C, 361; 38 Sup. Ct. Rep., 159; Ann. Cas. 1918B, 856; *Ex parte Milligan*, 4 Wall., 2; 18 L. Ed., 281 *Legal Tender Cases*, 12 Wall., 457; 20 L. Ed., 287; *Stewart vs. Kahn* (*Stewart vs. Bloom*), 11 Wall., 493; 20 L. Ed., 176. On the face of the statutes it is manifest that they were in terms based upon the war power, since the authority they gave arose only because of the existence of war, and the right to exert such authority was to cease upon the war's termination. To interpret, therefore, the exercise of the power by a presumption of the continuance of a State power limiting and controlling the national authority *was but to deny its existence*. It was akin to the contention that the supreme right to raise armies and use them in case of war did not extend to directing where and when they should be used. *Cox vs. Wood*, 247 U. S., 3; 62 L. Ed., 947; 38 Sup. Ct. Rep., 421.
>
> "(*b*) The elementary principle that, under the Constitution, the authority of the Government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indisputable. This being true, it results that al-

though authority to regulate within a given sphere may exist in both the United States and in the States, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that to the extent that any conflict arises the State power is limited, since in case of conflict that which is paramount necessarily controls that which is subordinate.

"Again, as the power which was exerted was supreme, to interpret it upon the basis that its exercise must be presumed to be limited was to deny the power itself. Thus, once more it comes to pass that *the application of the assumed presumption was in effect but a form of expression by which the power which Congress had exerted was denied.* In fact, error arising from indulging in such erroneous presumption permeates every contention." (Italics added.)

To the same effect are:

Selective Draft Law cases, 245 U. S., 366 (62 L. Ed., 349).

Cox vs. Wood, 247 U. S., 3 (62 L. Ed., 947).

Dakota Central Telephone Co. vs. South Dakota ex rel. Payne, 250 U. S., 163 (63 L. Ed., 910).

Commercial Cable Co. vs. Burleson, 255 Fed., 99.

Southwestern Tel., etc., Co. vs. Houston, 256 Fed., 690.

Castle vs. Southern R. Co., 112 S. C., 407; 99 S. E. 846.

As illustrative of the efforts in some jurisdictions to hold the transportation companies liable on this theory of their absolute and inherent duties to the public as common carriers, attention is directed to three recent cases in the Supreme Court of North Carolina, viz: *Hill vs. Director General*, 178 N. C., 607; 101 S. E., 376; *Clements vs. Southern R. Co.*, 179 N. C., —; 102 S. E., 399, and *Gilliam vs. Atlantic Coast Line Railroad Co.*, 103 S. E., 10.

In the *Hill* case the railroad company and the Director

General were sued jointly, and it was held that a cause of action was stated against the corporation *alone* and that the Director General was "only a party as having control and management of the defendant road sued." The ground of the ruling was based on the assertion that as the lessor the carrier was liable for the acts of its lessee, the United States.

The *Clements case*, which was also a suit against the railroad company and the Director General, held that under section 10 of the Federal control act of March 21, 1918, the corporation was liable to be sued, that the Director General was "to be considered a party only as being in the management and control of the defendant railroad," and that the Director General was "simply in effect a statutory receiver appointed by the President under authority of the act of Congress." It was further held that by the contract concluded between the railroad company and the United States, the status of lessor and lessee was created, with consequent liability to the railroad as lessor for the lessee's acts.

The *Gilliam* case was likewise a joint suit against the railroad company and the Director General, and the court went so far as to hold the railroad system was not seized by the Government *in invitum*, but was taken over *by contract*, and that under such contract the railroad lessor was liable for the acts of its lessee.

Two of these cases, *Hill* and *Clements*, assert that the Director General had merely succeeded to the management and control of *the defendant railroad corporation*, and therefore he was merely a nominal defendant on the record. This is but a restatement in different form of the fallacy underlying all the cases affirming liability of the corporation for the acts of the United States, namely, the assertion of mere Federal supervision of an operation by the owner corporations as distinguished from an absolute, complete and exclusive assumption of possession and control of the *properties* of such corporations and the operation of such properties by the agents

of the Government *to the complete exclusion of the corporations.* Under the principles adjudicated by this court in the *North Dakota case* and the *Dakota Central Telephone Company case*, the Director General never was for a moment in the control and management of the defendant railroad company, but was *only in the control and management of its property.* It is quite true, the corporation did not, by the congressional and presidential action, cease to exist as a separate entity, but it is equally true that it ceased to function as a common carrier. Thus in *Rutherford vs. Union Pacific Railroad Company*, 254 Fed., 880, it is said:

> "From and after the taking of possession of the railroads by the President, *the corporations or persons who had previously controlled them ceased their functions and obligations as carriers.* While goods and passengers continued to be carried, the carriage was conducted by the Director General. The acts of the former officers and employees who retained their positions and conducted the details of operation were the acts of the Director General." (Italics added.)

Again, in *Nash vs. Southern Pacific Company*, 260 Fed., 280, we find:

> "What was authorized by this legislation to be taken under Federal control was specific property—that is, *solely the transportation systems of the country*—and that was all the proclamations of the President *assumed to take into his control. The corporations owning these properties were not taken;* they were left untouched and free to continue their functions as such in all respects other than in the operation of their carrier systems." (Italics added.)

Hence the ground first asserted as a basis of liability on the part of the carrier corporation must fail.

Nor is there any more of merit in the ground that the status between carrier corporations and the United States, resulting from the congressional and presidential action, was

in effect a lease by the corporations to the United States and that on common-law principles governing common carriers the corporation lessors are liable.

No question is or can be made as to the want of power in a common carrier to relieve itself of its duties and liabilities to the public, for as said by this court in *Washington, etc., R. Co. vs. Brown*, 17 Wall., 445 (21 L. Ed., 675):

> "It is the accepted doctrine in this country that a railroad corporation" (and we may add, any common carrier) "cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessees does not change the relations of the original company to the public."

The cases are collated in:

5 R. C. L., p. 59.
10 C. J., 881.

In the *Gilliam* case the court declared that, "with very few exceptions, the control and management of the various railroads in this country were *acquired* by an *actual lease* from *each company*," which was a palpably incorrect statement, as every court should take judicial notice of the fact that the systems of both the transportation companies and the wire companies were *first actually* seized and taken over by the United States and *thereafter contracts providing for compensation*, not voluntary leases, were entered into between the companies and the United States. This was expressly ruled by this court in the *Dakota Central Telephone Company case, supra*. Disposing of the same contention the Circuit Court of Appeals for the Second Circuit in *Krichman vs. United States*, 263 Fed., 538, said:

> *"The claim that the railroads were taken over in pursuance of contracts made by the Director General of Railroads is not borne out by the facts. The con-*

tracts were merely agreements for compensation made under the Federal control act of March 21, 1918." (Italics added.)

But the principle upon which a lessor carrier corporation is held liable for the acts of its lessee is that in accepting a charter such carrier assumes the performance of all duties to the public imposed upon it by the charter or the general laws of the State, and it cannot, consistently with public policy, be permitted to absolve itself from such duties by *voluntarily* transferring its chartered rights and privileges to another, in the absence of statutory authority so to do.

Washington, etc., R. Co. vs. Brown, supra.

Central Trust Co. vs. Charlotte, etc., R. Co., 65 Fed., 257.

Reed vs. Southern R. Co., 75 S. C., 162, and cases cited.

It is thus apparent that this inability of the common carrier only obtains when its action is *voluntary* and does not exist when the transfer is either (1) *involuntary*, or (2) *made under legislative authority*. In the instant case, however, the telegraph company had no choice whatever in the matter, for its property was seized *in invitum* by, and it was compelled to contract in regard to compensation therefor, willingly or unwillingly, with the sovereign Government of the United States, an authority paramount to the State from which the carrier received its franchises, and which in thus acting was but exerting its constitutional power to utilize the material resources of the country in a time of national peril. This predicating of carrier liability on a supposed relation of lessor and lessee created between the carrier and the Government, as was so well pointed out by this court in disposing of a similar contention in *Northern Pacific Railroad Co. vs. North Dakota ex rel. Langer*, and *Dakota Central Telephone Co. vs. South Dakota ex rel. Payne, supra*, is but an-

other way of asserting that the authority of the United States in taking over the transportation, telegraph and telephone lines was not exclusive and unlimited, but that State control existed to the same extent and over the same matters as had existed prior to the assumption of control by the Federal Government. As was stated by the Chief Justice in the *North Dakota case*, this erroneous assumption of continued State control permeated every contention made in that case, as well as in the *Dakota Central Telephone case*; and the court held that the control, possession and operation by the United States was complete and exclusive and free from any limitation or restriction whatever by the States. The conclusion so reached in these cases is utterly incompatible with any idea of liability on the part of the corporation for the acts of the Government committed in its sovereign capacity.

If the relation between the United States and the telegraph company was merely that of lessor and lessee, or principal and agent, this would be a simple question of contract and the authority of the United States as the lessee or agent would be wholly derivative and could rise no higher than its source, namely, the will of its lessor or principal. Assuming such to be the relation between the Government and the telegraph company, it is manifest that such contract could have been terminated by the lessor or principal at any time, and if improperly terminated the only redress left to the United States would have been an action for damages. In other words, the application to the relation between the parties of the rules applying to ordinary contracts between lessor and lessee, or principal and agent, would have left it wholly within the power of the telegraph company to destroy at any time the Government's control and operation thereof. But, as has been seen, this was not the relation between the United States and the company. On the contrary, the United States, acting under the supreme and paramount war power created by the Federal Constitution and called into play by the act of Congress, assumed a complete and exclusive supervision, pos-

session, control and operation of the telegraph companies' systems, which could not be in any way affected or interfered with by such telegraph companies, not only for the duration of the war but until "the date of the proclamation by the President of the exchange of ratifications of the treaty of peace."

In the case of *Commercial Cable Company vs. Burleson*, 255 Fed., 99, the cable company questioned the authority of the President to take the supervision, possession, control and operation of its lines, but this contention was denied, the court saying that under the war powers granted to the President, he had the right to *condemn*, as it were, the property of the cable company for the use of the Government in prosecuting the war to a successful conclusion.

And in *Nash vs. Southern Pacific Co.*, 260 Fed., 280, we find this statement:

> "As the terms of the act at once disclose, it was the purpose and intent of Congress that the possession and control of the systems of transportation taken over in whole or in part by the President was to be an exclusive one, to no extent shared in by the owners. If the latter or their officers were retained as operators, they were to act merely as servants and under pay of the Government; and while the owners were to be compensated for the use of their properties, everything earned or accruing from their operation in excess of such compensation was to be the property of the Government. *Such a taking involved in no sense the element of agency by the Government for the owners.* Agency implies a consentual or contractual relation, but this was not such. *It was more nearly analogous or akin to a taking by the sovereign in the right of eminent domain; and the result of such a taking was necessarily to relieve the owners of systems so taken from any legal responsibility to the public arising out of their operation*, and quite as necessarily an assumption of such responsibility by the Government." (Italics added.)

In other words, the act of the United States in taking over the telegraph systems to be used as governmental agencies in the prosecution of the war was in effect a *condemnation* of such systems to the uses of the United States for the period of the emergency, and the contracts subsequently entered into between it and the various companies were but methods of making the compensation required by the act authorizing the condemnation.

Crozier vs. Krupp, 224 U. S., 290 (56 L. Ed., 771).
Dakota Central Telephone Co. vs. South Dakota ex rel. Payne, supra.
Krichman vs. United States, supra.

From these considerations it inevitably results that no relationship of lessor and lessee existed, and hence no liability can be placed on this ground.

It is next in order to examine the proposition that liability can be based either on a relationship of principal and agent existing between the carrier corporation and the United States or on a relationship of master and servant existing between such corporation and the agents and employees of the United States in the management of the business.

Respecting the contention that the Government, in its control and operation of the systems, was acting merely as the agent of the companies we find in *Schumacher vs. Pennsylvania R. Co.*, 106 N. Y. Misc., 564, 175 N. Y. Supp., 84, this statement:

> "The Federal Government, in the control and operation of the railroad properties taken over, is in no sense the agent or representative of the railroad companies to whom the systems belong. * * * The Federal Government, in the operation of the systems taken over, acts as the principal and not as the agent of the owners of the transportation system."

And in *Mardis vs. Hines*, 258 Fed., 945, the court declares in reference to the alleged relation of master and servant:

> "From the time that the proclamation of the President became effective on December 28, 1917, the Director General as the representative of the President has been in the exclusive possession and control of the railroad. The railroad company exercises no control whatever. The railroad is operated under the orders of the Director General. The railroad company has nothing to do with such operation. When the Director General assumed control all the employees on the railroad ceased to be employees of the railroad company and became employees of the Director General. *At that time the relation of master and servant ceased to exist between the employees operating the railroad and the railroad company.* That relation then began and still exists between such employees and the Director General." (Italics added.)

Again, in *Southern Cotton Oil Co. vs. Atlantic Coast Line R. Co.*, 257 Fed., 138, it is said:

> "When the Director General assumed control, the acts of the former officers and employees, who retained their positions and conducted the details of operation of the railroads, were the acts of the Director General. *Rutherford vs. Union Pac. R. Co.* (D. C.), 254 Fed., 880. *Their employment by the Director General made them exclusively the servants or agents of the employer. There could be no divided allegiance as agents of the railroad corporation and of the Director General*, so as to accomplish the purpose of Congress. The acts of Congress, the proclamation of the President, and the general orders of the Director General *neither expressly nor by implication contemplated a dual agency of employees engaged in the operation of the railroads.*" (Italics added.)

All of these rulings are fully supported by the decisions in:

Railroad Commissioners vs. Burleson, 255 Fed., 604.

Hatcher & Snyder vs. Atchison, etc., R. Co., 258 Fed., 952.

Haubert vs. Baltimore & Ohio R. Co., 259 Fed., 361.

Canidate vs. Western Union Tel. Co. (Ala.), *supra*.

Western Union Tel. Co. vs. Wallace (Tex.), *supra*.

Western Union Tel. Co. vs. Glover (Ala.), *supra*.

Western Union Tel. Co. vs. Davis (Ark.), *supra*.

But whether the relationship of principal and agent, or of master and servant, exists in a given case is always to be determined "by ascertaining who has *the power to control and direct*" the agent or servant in the performance of the work. *Standard Oil Company vs. Anderson*, 212 U. S., 215 (53 L. Ed., 480). Or, as said by Judge Sanborn in delivering the opinion of the Circuit Court of Appeals in *Brady vs. Chicago, etc., R. Co.*, 114 Fed., 100; 57 L. R. A., 712:

> "*The power of control is the test of liability*, under the maxim *respondeat superior*. If the master cannot command the alleged servant, then the acts of the latter are not his, and he is not responsible for them. If the principal cannot control and direct the alleged agent, then he is not his agent, and the principal is not liable for his acts or his omissions. In such case the maxim *respondeat superior* has no application, because there is no superior to respond. In an action against an alleged master or principal for the act of his alleged servant or agent under the maxim *respondeat superior*, there can be no recovery in the absence of the right and power in the former to command or direct the latter in the performance of the act charged because in such a case there is no superior to answer." (Italics added.)

The same principle has been stated and applied by this court in the following cases:

New Orleans, etc., R. Co. vs. Hanning, 15 Wall., 649 (21 L. Ed., 220).

Singer Mfg. Co. vs. Rahn, 132 U. S., 518 (33 L. Ed., 440).

Chicago, etc., R. Co. vs. Bond, 240 U. S., 449 (60 L. Ed., 735).

That neither the wire corporations nor their officers had any power whatever to control either the operation and management of the systems or any of the agents or employees engaged in such operation and management was strikingly illustrated by the action of the Postmaster General in connection with the control of the cable lines of the Commercial Cable Company.

On November 2, 1918, the President, pursuant to the joint resolution of July 16, 1918, issued a proclamation by which he took possession and assumed control of all of the marine cable systems, this proclamation being practically identical with that by which he assumed possession and control of the land lines. Thereafter, just as in the case of the land lines, the Postmaster General issued an order directing the officers, operators and employees of the cable companies to continue in the performance of their existing duties until further notice. Subsequent to the issuance of this order, the Postmaster General, acting on behalf of the United States, decided to effect a "unification in operation" of the cable systems under one management, and in order to carry out such unification, directed that Mr. George G. Ward, vice-president of the Commercial Cable Company, and the operating head of such company, assume the management and operation of the systems. The officers of the Commercial Cable Company refused to acquiesce in the directions of the Postmaster General, and by Order No. 2474, issued December 12, 1918, the Postmaster General excluded Clarence H. Mackay, George G. Ward, and William W. Cook, official heads of the Commercial Cable Company, "from any connection with the supervision, possession, control or operation of any and all marine

cable systems or any part thereof, the supervision, possession, control and operation of which was taken over and assumed by the President," and directed an officer of an entirely different company to assume the management and operation of all the marine cable systems. This order will be found set out in full as Exhibit "B" in the appendix hereto.

If the officers of the telegraph company, who had been continued in the service during the operation of its lines by the United States, had refused to carry out any similar orders of the Postmaster General, they would have been removed in the same manner as were these officers of the cable company. But if the United States had the right not only to remove them from its service, but, in addition, to exclude them from any connection with the "supervision, possession, control or operation" of the systems, clearly neither the corporation nor the officers thereof, through whom it must necessarily act, had any power whatever to control the actions of the United States or those of its agents, servants and employees. From this it results necessarily that there was no power of control on the part of the corporation or its officers, and hence nothing upon which to base liability.

It must therefore follow, under the facts as they exist, in the light of the legal principles to which we have adverted, that any case that holds a carrier corporation liable for the acts of the United States during the possession, control, and operation of its property by the United States, on the theory of a relationship of principal and agent existing between such corporation and the United States, or a relationship of master and servant existing between such corporation and the agents and employees of the United States, is without foundation in fact and without authority in law.

In the *Clements case*, however, the North Carolina court asserted that the Director General was "simply in effect a statutory receiver," and from this drew the deduction that as such he was "to be considered a party only as being in the management and control of the defendant railroad." This

so-called "statutory receiver" was then treated by the court as a merely nominal defendant, and liability was adjudged against the corporation.

The analogy between the Director General or Postmaster General and a receiver, which seems to have been first suggested in *Rutherford vs. Union Pacific R. Co.*, 254 Fed., 880, is, however, by no means perfect; the principal difference being in the case of the Director General or Postmaster General, the enforced taking of all the property of the corporation at an enforced rental and an appropriation by the sovereign taker *to its own use* of all revenues derived by it from its operation thereof, and in the case of the receiver, the taking over of the corporate business and affairs into the custody of the court and there managing them for the *sole benefit of the corporation and its creditors.*

But we concede there is sufficient analogy between the two cases to make directly applicable to corporations whose properties are in the hands of the Director General or of the Postmaster General, as the case may be, the rule administered by this and the lower Federal courts as to the *personal* liability of the corporation for the acts of its receiver when by the receivership it has been divested of all control over both its property and those who operate it, under which rule the result in the *Clements case* was entirely unwarranted.

In a recent text work, 23 R. C. L., p. 51, title Receivers, sec. 54, the rule is thus tersely and accurately stated:

> "The authorities agree that, in the absence of any absolute liability created by statute, a railroad company whose road, with all its appurtenances, is in the exclusive possession, use, and control of a receiver who has power to employ, control, and dismiss all the agents, servants, and employees engaged in its operation, is not liable for injuries resulting from the negligence of the agents and servants of the receiver operating the road. The company, under such circumstances, has no power to control either the receiver or his employees. His possession is not that of the

company, but is antagonistic thereto. But the company is not relieved from liability, unless the possession of the receiver is exclusive and the servants of the road are wholly employed and controlled by him."

This court, in *Washington, etc., R. Co. vs. Brown*, 17 Wall., 445 (21 L. Ed., 675), stated the law in these words:

"The operation of the road by the lessees does not change the relations of the original company to the public. It is argued, however, that this rule is not applicable where the proceeding, instead of being voluntary, is compulsory, as in the case of the transfer of possession to a receiver by a decree of a court of competent jurisdiction. Whether this be so or not, we are not called upon to decide, because *it has never been held that the company is relieved from liability, unless the possession of the receiver is exclusive and the servants of the road wholly employed and controlled by him*. In this case the possession was not exclusive, nor were the servants subject to the receiver's order alone. On the contrary, the road was run on the joint account of the lessees and receiver, and the servants employed and controlled by them jointly. Both were, therefore, alike responsible for the act complained of, and if so, the original company is also responsible, for the servants under such an employment, in legal contemplation, are as much the servants of the company as of the lessees and receiver." (Italics added.)

And Judge Lurton, in delivering the unanimous opinion of the Circuit Court of Appeals for the Sixth Circuit, in *Memphis, etc., R. Co. vs. Hoechner*, 67 Fed., 456, said:

"The receivers, as such, are liable for their negligent acts. Both to the public and to employees they stand responsible to the full extent of the earnings resulting from their management, and, under some circumstances, the property itself may constitute a fund which may be reached and subjected by those sustaining injuries. *But we know of no legal principle*

which would justify a court in holding a corporation, which is excluded from all control and management, responsible for the torts of such receivers, or for the negligent acts of their servants. The relation of master and servant does not exist between the excluded corporation and the servants of the receivers. If the possession of the receivers be exclusive, as was the case under the decree appointing McGhee and Fink, *the corporation can neither employ, discharge nor control such servants; and it would be a gross injustice to say that, under such circumstances, it should be liable for the conduct of servants which it neither employed nor controlled.*

"In High on Receivers the rule is thus stated:

" 'Since the *receivers* of a railway *who are vested with its absolute control and management* are thus liable for injuries resulting from negligence in operating the road to the same extent that the company might have been liable, *it would seem to be clear, upon principle and in the absence of any absolute liability created by statute, that the corporation itself cannot be held responsible for the negligence of servants of a receiver operating the road. The receiver's possession is not the possession of the corporation, but is antagonistic thereto, and the company cannot control either the receiver or his employees.*' High. Rec., sec. 396.

"This is in accord with the doctrine as stated by other text writers of repute: Rorer, R. R., p. 896; Jones, Ry. Secur., p. 285; Patt. Ry. Acc. Law, sec. 134; Wood, R. R., secs. 385-482. The direct question has not often arisen for decision, but, when it has, the courts have almost uniformly announced the doctrine we have stated. *Metz vs. Railroad Co.*, 58 N. Y., 66; *Turner vs. Railroad Co.*, 74 Mo., 604; *State vs. Wabash Ry. Co.*, 115 Ind., 466; 17 N. E., 909; *Godfrey vs. Railroad Co.*, 116 Ind., 30; 18 N. E., 61; *Railroad Co. vs. Stringfellow*, 44 Ark., 322; *Railway Co. vs. Dorough*, 72 Tex., 111; 10 S. W., 711; *Meara vs. Holbrook*, 20 Ohio St., 145, 146; *Thurman vs. Railroad Co.*, 56 Ga., 376; *Davis vs. Duncan*, 19 Fed., 477. The principle upon which the doctrine rests is

that applicable to the liability of the lessor for the torts of the lessee company when the lease is authorized by law. *Arrowsmith vs. Railroad Co.*, 57 Fed., 178; *Byrne vs. Railroad Co.*, 9 C. C. A., 666; 61 Fed., 605. When the possession or control is in fact a joint one, the rule is otherwise, for the obvious reason that the servants are the joint servants of two masters, and each would be liable. But the cases making this distinction recognize the general rule to be as we have stated it. The nonliability of the corporation depends upon the control being really and exclusively in the receivers. *Railroad Co. vs. Brown*, 17 Wall., 445-450; *Railroad vs. Jones*, 155 U. S., 354; 15 Sup. Ct., 136; *Railway Co. vs. Johnson*, 76 Tex., 421; 13 S. W., 463." (Italics added.)

To the same effect are:

Pennsylvania R. Co. vs. Jones, 155 U. S., 333 (39 L. Ed., 176).

Landers vs. Felton, 73 Fed., 311.

Gableman vs. Peoria, etc., R. Co., 82 Fed., 790.

Baltimore & Ohio R. Co. vs. Burris, 111 Fed., 882.

Judge Lurton, in the quotation above made, has stated the precise condition obtaining, according to all the decided cases to which we have referred, between the United States and these carrier corporations whose properties were taken over, and if exclusion from all control and management of the property, and all right to direct, employ, discharge, or control the servants, during a receivership, will render a corporation immune from suit on causes of action arising out of the receiver's possession and operation, *a fortiori*, similar exclusion will render these corporations immune from suits on causes of action arising out of the possession and operation of their properties by the United States through the Director General of Railroads or the Postmaster General.

So that from a critical analysis of the facts, and the application thereto of the controlling principles of law laid down

by this and other courts, we are forced to conclude that neither anything, express or implied, in the joint resolution of Congress or the proclamation of the President, nor any principle of the law governing common carriers, renders the owner corporation liable for the acts of the United States not performed in its behalf, or under its direction, control, or authority, or for its benefit, and as to which it has no relation of principal, master, or beneficiary, or in which it in no way participates.

As was well said in the recent case of *Blevins vs. Hines*, 264 Fed., 1005:

> "On common-law principles, it goes without saying that the carrier is not in the least degree responsible for the injury, has no interest in the controversy, and hence is not properly joined as a defendant."

It therefore follows that the telegraph company having been entirely eliminated from both the possession and operation of the property, and the United States being in absolute control and dominion, even though exercising such control through individuals who had been officers and agents of the company but who had become agents of the United States, this suit is no more maintainable against it than it would be against any other outside or disinterested person.

II.

FEDERAL POSSESSION, CONTROL, AND OPERATION OF THE TELEGRAPH SYSTEMS, AND LIABILITY OF THE UNITED STATES THEREUNDER.

Under this head we consider these three propositions:

1. The acts and omissions complained of in the present case were those of the United States, and not those of the telegraph company; hence the United States is the real party in interest.

2. The United States being the real party in interest, authority to bring and maintain this suit indirectly against the United States must be found in an act of Congress or it does not exist.

3. The judgment herein is ineffective against the United States, and, if effective at all, is effective solely against the telegraph company.

These will now be considered in the order stated.

1. **The acts and omissions complained of in the present case were those of the United States, and not those of the telegraph company, hence the United States is the real party in interest.**

Federal possession, control, and operation of the telegraph systems commenced August 1, 1918, and ended August 1, 1919 (Act of July 11, 1919, 41 Stat. L., 157). The transactions out of which this suit arises were had on the 2d and 3d days of October, 1918 (Transcript, pp. 2-3), hence they obviously fall within such period of Federal possession, control, and operation. The three telegrams, involved were, respectively, (1) a request for an offer on the cotton, (2) an actual offer, and (3) an acceptance of the offer, and the contracts for the transmission and delivery of the first and third were entered into between Poston himself and the agent in the telegraph office at Johnsonville, while the contract relating to the second was entered into between Poston's broker and the agent in the telegraph office in Charleston; and any breach of such contracts by delay in the transmission and delivery of these telegrams whereby Poston sustained loss as alleged in his complaint resulted solely from the acts of nonfeasance or misfeasance of these and other agents and servants engaged in carrying on the telegraph business. It is true, these agents and servants prior to Federal operation may

have been agents and servants of the telegraph company, since both the proclamation of the President and order No. 1783 of the Postmaster General continued all such in the service; but when the United States assumed the absolute and complete possession, control, and operation of the telegraph system, it excluded the telegraph company from *all interest and participation therein*, and the company's former agents and servants retained in the service ceased to be the agents and servants of the telegraph company, and became *solely the agents and servants of the United States*. This conclusion results as a necessary corollary from the decisions of this court in the *Dakota Central Telephone Company case* and the *North Dakota case, supra*. It is also expressly ruled in:

Railroad Commissioners vs. Burleson, 255 Fed., 604.
Mardis vs. Hines, 258 Fed., 945.
Hatcher & Snyder vs. Atchison, etc., R. Co., 258 Fed., 952.
Haubert vs. Baltimore & Ohio R. Co., 259 Fed., 361.
Southwestern Bell Tel. Co. vs. State (Okla)., 181 Pac., 487.
Canidate vs. Western Union Tel. Co., supra.
Western Union Tel. Co. vs. Wallace, supra.
Western Union Tel. Co. vs. Glover, supra.
Western Union Tel. Co. vs. Davis, 218 S. W., 833.
Mitchell vs. Cumberland Tel. Co., 221 S. W., 547.

Further than this, the joint resolution embraced and the action of the President exerted the right of the United States not only to take over the entire business, but the right of the United States to appropriate as its own property all the revenues arising from its operation thereof. So that the excluded owner corporation had no connection with the system, no control over the agents and servants, no voice in its management, no right to the revenues, all of these powers having passed to the United States under an express agreement in the statute authorizing the taking of the properties to make just compensation to the owner for the loss thereof.

This being the case, manifestly the telegraph company had no interest in the transactions which give rise to this suit, but these were solely the concern of the United States. But if this be true, then it would seem that the United States, and not the telegraph company, was the real party in interest. That such must be the result is readily demonstrable.

The determining principle in ascertaining who is the real party in interest when the suit is against officers or agents of the United States, or concerns transactions with which the United States is either connected or in some way interested has been stated by this court in *Minnesota vs. Hitchcock,* 185 U. S., 373 (46 L. Ed., 954), to be this:

> "Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined not by the fact of the party named as defendant on the record, but *by the result of the judgment or decree which may be entered,* the same rule must apply to the United States. *The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.*" (Italics added.)

The rule thus laid down has been approved and applied by this court in the following cases:

Oregon vs. Hitchcock, 202 U. S., 60 (50 L. Ed., 935).

Kansas vs. United States, 204 U. S., 331 (51 L. Ed., , 510).

Louisiana vs. McAdoo, 234 U. S., 627 (58 L. Ed., 1506).

Applying this test to the facts of the instant case we have this result: The action is for breach of contract made with the agents of the United States, hence the liability is that of their principal, the United States, and if this be true, the judgment recovered for such breach should be enforcible only out of the property of the United States, and particularly the income earned by it from the telegraph business. It therefore follows that while the telegraph company is named as the defendant on the record, the rights of the United States affected by the judgment are such as to make it the real party in interest. This conclusion is abundantly sustained by the decisions.

In the case of *Louisiana vs. McAdoo*, 234 U. S., 627 (58 L. Ed., 1506), the State of Louisiana, as a producer of sugar, sought leave of this court to file a petition against the Secretary and Assistant Secretary of the Treasury of the United States to review their official judgment as to the rate of duty to be exacted on importations of Cuban sugar. The United States contended in opposition that the suit was against it, and could not be maintained without its consent. Leave to file was denied, this court holding that the effect of the suit would be to "affect the revenues" of the United States, which rendered it a suit against the United States.

The case of *Wells vs. Roper*, 246 U. S., 335 (62 L. Ed., 755), was a bill in equity to enjoin the First Assistant Postmaster General from annulling a contract between the plaintiff and the Postmaster General, acting for the United States, for furnishing certain specially equipped automobiles to be used for a stated period in collecting and delivering mails in the City of Washington, and from putting into effect in lieu thereof an experimental combined screened automobile or wagon collection and delivery service, as contemplated under an act of Congress dated March 9, 1914. The bill was dismissed, this court saying:

> "The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract, and thus prevent the inauguration of the experimental service contemplated by the Act of 1914—*a direct interference with one of the processes of government.* * * * That the interests of the Government are so directly involved as to make the United States a *necessary* party, and therefore to be considered as in effect a party, although not named in the bill, is entirely plain." (Italics added.)

These two cases decided by this court cannot be distinguished in principle on this point from the instant case, hence they would seem to be conclusive of it.

In a number of the cases seeking to enjoin the charging and collecting during Federal control of all the carrier systems of intrastate rates other than those prescribed by State authority, the precise question has arisen and each time it has been held that the United States was the real party in interest. The court's attention is directed to a few of such cases.

In *Public Service Commission vs. New England Telephone, etc., Co.*, 232 Mass., 465; 122 N. E., 567, the plaintiff brought suit to enforce by injunction intrastate rates made pursuant to State law, and the defendant telephone company in its answer, *inter alia*, averred that the relief prayed would in effect restrain the United States. This contention of the defendant was sustained, the court holding that the case on this point was indistinguishable from *Louisiana vs. McAdoo, supra*, and *Wells vs. Roper, supra*. On writ of certiorari to this court, the decision was affirmed in *McLeod vs. New England Telephone & Telegraph Co.*, 250 U. S., 195 (63 L. Ed., —).

In *Southwestern Bell Telephone Co. vs. Oklahoma* (Okla.), 181 Pac., 487, the State brought suit to enjoin the charging of tolls in excess of those authorized by State law. The court denied the injunction, holding that the Postmaster General was an indispensable party to the action, as the ef-

fect of the decree would be "to interfere with his operation and control."

In *Railroad Commissioners vs. Cumberland Telephone, etc., Company and A. S. Burleson, Postmaster General* (La.), — South., — (not yet reported), the plaintiffs obtained an injunction in the lower court preventing the company and the Postmaster General from enforcing intrastate rates promulgated by the Postmaster General. On writ of certiorari to the State Supreme Court, the plea of the Postmaster General to the jurisdiction on the ground that the suit was against the United States was sustained, and the injunction dissolved, the court saying:

> "The suit is clearly against the Government, and the courts of the State are without jurisdiction over it."

To the same effect are the rulings in:

State of Wisconsin vs. Wisconsin Tel. Co. (Wis.), 172 N. W., 225.

Haubert vs. Baltimore & Ohio R. Co., 259 Fed., 361.

It is well settled that where, in a suit against an officer or agent of the United States, the act complained of, considered apart from the official authority alleged as its justification, is the *personal* act of such officer or agent constituting a breach of *personal* duty owed to the plaintiff, the United States is not the real party in interest, and the suit will lie against the officer or agent.

In re Ayers, 123 U. S., 443 (31 L. Ed., 216).

Roberts vs. United States, 176 U. S., 219 (44 L. Ed., 443).

Minnesota vs. Hitchcock, 185 U. S., 373 (46 L. Ed., 954).

United States ex rel. Parish vs. McVeagh, 214 U. S., 124 (53 L. Ed., 936).

Houston vs. Ormes, — U. S., — (64 L. Ed., —), decided April 19, 1920.

This principle, however, is wholly inapplicable to the present case. As this court held in the *Dakota Central Telephone Company case*, when the United States took over the wire lines and entered into the conduct of the telegraph business it was operating such business *"as a governmental agency."* The contracts for the breach of which this suit is brought were made with agents of the United States in the actual course of the operation of such governmental agency, hence the breach of duty by failing to transmit and deliver the telegrams promptly was a breach of duty by the United States as the carrier conducting the business, and not a breach of a duty owed personally by such agents to the plaintiff. The case, therefore, falls squarely within the principle announced in the leading case of *Hodgson vs. Dexter*, 1 Cranch, 345 (2 L. Ed., 130), where was involved the question of the right to maintain a suit against the Secretary of War *personally* on a lease made to him and his successors, and respecting which this court, speaking through Chief Justice Marshall, said:

> "The court is unanimously and clearly of opinion that this contract was entered into entirely on behalf of the Government, by a person properly authorized to make it, and that its obligation is on the Government only. Whatever the claims of the plaintiff may be, it is to the Government and not to the defendant he must resort to have them satisfied."

This case has been cited with approval in the following cases:

> *Garland vs. Davis*, 4 Howard, 131 (11 L. Ed., 907).
> *Belknap vs. Schild*, 161 U. S., 10 (40 L. Ed., 599).
> *District of Columbia vs. Camden Iron Works*, 181 U. S., 453 (45 L. Ed., 948).

The authorities, therefore, conclusively establish that the United States, and not the telegraph company named as de-

fendant on the record, is the real party in interest in this case.

2. The United States, being the real party in interest, authority to bring and maintain this suit indirectly against the United States must be found in an act of Congress or it does not exist.

But if, as shown, the United States, and not the defendant telegraph company, is the real party in interest, the question then arises as to the authority to bring this suit and recover indirectly against the United States.

Whatever may be the true principles on which it is founded (*U. S. vs. Lee*, 106 U. S., 196; 27 L. Ed., 171), it is a rule firmly established by an unbroken current of decisions of this court dating back to its very beginning that the United States, like all sovereigns, is exempt from suit in any court, either at law or in equity, without its consent. The rule is thus clearly stated in the leading case of *Belknap vs. Schild*, 161 U. S., 10; 40 L. Ed., 599:

> "The United States, however, like all sovereigns, cannot be impleaded in a judicial tribunal, except so far as they have consented to be sued. This doctrine has been affirmed by this court in cases too numerous to be cited, and was clearly stated by Mr. Justice Field delivering judgment in the case of *The Siren*, as follows: 'It is a familiar doctrine of the common law that the sovereign cannot be sued in his own courts, without his consent. The doctrine rests upon reasons of public policy—the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to

the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and *whoever institutes such proceedings must bring his case within the authority of some act of Congress.* Such is the language of this court in *United States vs. Clarke*, 8 Peters, 444. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, *there is no distinction between suits against the Government directly and suits against its property.' The Siren*, 7 Wall., 152, 154. 'So much of this statement as regards suits against the United States or against their property was repeated by the present Chief Justice in the recent case of *Stanley vs. Schwalby*, 147 U. S., 508, 512." (Italics added.)

Among the numerous cases in this court announcing and applying the rule we may cite:

Cohens vs. Virginia, 6 Wheat., 264, 380 (5 L. Ed., 257).

United States vs. Clarke, 8 Peters, 436 (8 L. Ed., 1001).

United States vs. McLemore, 4 How., 286 (11 L. Ed., 977).

Hill vs. United States, 9 How., 386 (13 L. Ed., 185).

Murray vs. Hoboken Land, etc., Co., 18 How., 272 (15 L. Ed., 372).

Nations vs. Johnson, 24 How., 195 (16 L. Ed., 628).

United States vs. Tillou, 6 Wall., 484 (18 L. Ed., 920).

Nicholl vs. United States, 7 Wall., 122 (19 L. Ed., 125).

The Siren, 7 Wall., 152 (19 L. Ed., 129).

The Davis, 10 Wall., 15 (19 L. Ed., 875).

United States vs. Thompson, 98 U. S., 486 (25 L. Ed., 194).

Carr vs. United States, 98 U. S., 433 (25 L. Ed., 209).
United States vs. Lee, 106 U. S., 196 (27 L. Ed., 171).
Finn vs. United States, 123 U. S., 227 (31 L. Ed., 128).
United States vs. Gleeson, 124 U. S., 255 (31 L. Ed., 420).
Stanley vs. Schwalby, 147 U. S., 508 (37 L. Ed., 259).
Stanley vs. Schwalby, 162 U. S., 255 (40 L. Ed., 960).
Minnesota vs. Hitchcock, 185 U. S., 374 (46 L. Ed., 954).
International Postal Supply Co. vs. Bruce, 194 U. S., 601 (48 L. Ed., 1134).
Oregon vs. Hitchcock, 202 U. S., 60 (50 L. Ed., 935).
Nagunab vs. Hitchcock, 202 U. S., 473 (50 L. Ed., 1113).
Kansas vs. United States, 204 U. S., 331 (51 L. Ed., 510).
Louisiana vs. Garfield, 211 U. S., 70 (53 L. Ed., 92).
New Mexico vs. Lane, 243 U. S., 52 (61 L. Ed., 588).
Illinois, etc., R. Co. vs. Public, etc., Com., 245 U. S., 493 (62 L. Ed., 425).
Wells vs. Roper, 246 U. S., 335 (62 L. Ed., 755).

Not only, however, is the United States exempt from suit in any court, except by its consent, but such consent must be given by an act of Congress in *express* terms. This is settled beyond dispute by the decisions of this court.

Thus in *United States vs. Clarke*, 8 Peters, 436 (8 L. Ed., 1001), Chief Justice Marshall, speaking for the court, declared:

> "As the United States are not suable of common right, the party who institutes such suit *must bring his case within the authority of some act of Congress*, or the court cannot exercise jurisdiction over it." (Italics added.)

This statement of the rule has been approved and followed in *The Siren*, 7 Wall., 152 (19 L. Ed., 129), *Belknap vs. Schild*, *supra*, and other cases.

In *Stanley vs. Schwalby*, 162 U. S., 255 (40 L. Ed., 960), the principle is stated in these words:

> "It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinion in this case, that *no suit can be maintained against the United States or against their property, in any court, without express authority of Congress.* 147 U. S., 512 (37 L. Ed., 261). See also *Belknap vs. Schild*, 161 U. S., 10 (40 L. Ed., 599). The United States by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but *they have never consented to be sued in the courts of a State in any case.*" (Italics added.)

The same point has been expressly ruled in the following cases:

Nicholl vs. United States, 7 Wall., 122 (19 L. Ed., 125).

The Davis, 10 Wall., 15 (19 L. Ed., 875).

Hill vs. United States, 9 How., 386 (13 L. Ed., 185).

Schillinger vs. United States, 155 U. S., 162 (39 L. Ed., 108).

Illinois Central R. Co. vs. Public Utilities Com., 245 U. S., 493 (62 L. Ed., 425).

The rule is further well settled that this exemption of the United States from suit, except by its consent, extends to suits in which the United States is *indirectly* interested as well as to those in which it has a direct interest, and in such *indirect* suits the courts, in the absence of an express grant by Congress, are without authority to enter any judgment that will bind either the United States or its property.

In *Belknap vs. Schild*, 161 U. S., 10 (40 L. Ed., 599), an injunction was sought against the commandant of the

United States navy yard at Mare Island, California, and some of his subordinates, to prevent the use of a caisson gate in the dry dock at that place, contrary to the rights of the plaintiff as patentee. The case was heard on pleas setting up that the caisson gate was made and used by the United States for public purposes and that it was the property of the United States. As the complaint sought, in addition to the injunction, the recovery of damages for the alleged tortious acts of the defendants, the court dismissed the bill without prejudice to the plaintiff to bring a law action, but held that the defendants had no personal interest in the continued use of the gate, and that so far as the injunction was concerned the suit was against the United States. Said the court:

> "There is *no* distinction between suits against the Government *directly* and suits against its property. * * * It necessarily follows that unless *expressly* permitted by act of Congress, no injunction can be granted against the United States." (Italics added).

The case of *International Postal Supply Co. vs. Bruce,* 194 U. S., 601 (48 L. Ed., 1134), was a bill in equity by the plaintiff, as the owner of the patent for a stamp cancelling and postmarking machine, against the defendant as postmaster of the United States post-office at Syracuse, New York, to enjoin the use in such post-office of two machines alleged to be infringements on plaintiff's patent. The machines in question in the Syracuse post-office were leased by the United States Post-Office Department for a term, which had not expired, from the manufacturer and owner, at an agreed rental, and were being used by the employees of the United States. This court declared that the suit was really against the United States and could not be maintained, saying:

> "In the case at bar the United States is not the owner of the machines, it is true, but it is a lessee in possession, for a term which has not expired. It has

> a property—a right *in rem*—in the machines, which, though less extensive than absolute ownership, has the same incident of a right to use them while it lasts. *This right cannot be interfered with behind its back*; and, as it cannot be made a party, this suit, like that of *Belknap vs. Schild*, must fail." (Italics added.)

In *Goldberg vs. Daniels*, 231 U. S., 218 (58 L. Ed., 191), the plaintiff applied to the court for a mandamus against the Secretary of the Navy to compel him to deliver a Government cruiser to the plaintiff as the highest bidder therefor under proposals for the purchase of such cruiser advertised by the Secretary. The lower court dismissed the petition on the ground that whether plaintiff's bid should be accepted was in the discretion of the Secretary. This ruling was affirmed by this court, which said:

> "We see no sufficient reason for throwing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the owner, in possession of the vessel. *It cannot be interfered with behind its back*, and as it cannot be made a party, this suit must fail." (Italics added.)

To the same effect are:

Stanley vs. Schwalby, 162 U. S., 255 (40 L. Ed., 960).

Louisiana vs. Garfield, 211 U. S., 70 (53 L. Ed., 92).

Wells vs. Roper, 246 U. S., 335 (62 L. Ed., 755).

Briefly stated, therefore, the rule to be deduced from the decisions of this court is that a suit, either at law or in equity, cannot be maintained, either *directly* or *indirectly*, against the United States in any court unless *expressly* authorized by an act of Congress.

But to recur to the facts of the present case: The suit is for breach of contracts to transmit and deliver telegrams entered into with the agents of the United States while it was

operating the telegraph system as "a governmental agency," the defendant telegraph company had no interest in or connection with such contracts, the effect of the judgment will be to interfere with the property of the United States by attempting to make collection out of the revenues of the United States, and the joint resolution under which the United States acquired the telegraph system contains not a word of authority to bring such suit. Such being the rule then, and such the facts, the case is identical in principle with the case of *International Postal Supply Co. vs. Bruce, supra*, and is concluded by it; for if the interests of the United States as lessee of a machine are such as to prevent a suit against a postmaster to restrain the use of such machine, *a fortiori* they must be such as to prevent the maintenance of a suit for breach of a contract entered into on behalf of the United States and the recovery of a judgment therein that will affect the property of the United States.

It likewise falls squarely within the decision in *Wells vs. Roper, supra*, for if, as held in that case, a bill in equity will not lie to enjoin the annulment by the Assistant Postmaster General of a contract made in behalf of the United States, certainly an action at law will not lie indirectly against the United States to recover for acts of the agents of the United States constituting a breach of contract entered into by such agents on behalf of the United States.

3. **The judgment herein is inoperative against the United States, and, if effective at all, is effective against the telegraph company.**

The decisions we have just been considering, unless there is something in this case to take it out of their operation, lead to two inevitable conclusions, viz: (1) the United States is the real party in interest, and (2) the suit cannot be maintained and judgment recovered therein *indirectly* against the

United States, since Congress has not seen fit to give the necessary consent therefor.

But it is insisted that paragraph (*e*) of section 8 of the contract entered into between the Postmaster General and the telegraph company gives authority to institute and maintain a suit like this against the telegraph company and thus indirectly to institute and maintain it against the United States, thereby removing it from the operation of the rules to which we have just referred. The provision in question reads thus (Transcript, Ex. 4, p. 46):

> "(*e*) The Postmaster General shall pay, or save the owner harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during the period of Federal control. He shall also pay or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of Federal control or anything done or omitted in the possession, operation, use or control of its property during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General or the United States."

The State Supreme Court gave this provision of the contract the force and effect for which respondent now contends, as appears from this language quoted from the opinion on page 61 of the transcript:

> "While the action and the judgment therein recovered are *in form* against the Western Union Telegraph Company, yet *in effect* they are against the Postmaster General.
>
> "The plaintiff followed the mode of procedure directed by the President in his proclamation and ordered by the Postmaster General, not only in his order hereinbefore mentioned, but also when he ratified the contract between the Western Union Telegraph Company and himself, which contemplated a

judgment *in form* against the defendant Western Union Telegraph Company." (Italics added.)

That this conclusion is wholly unsound is readily demonstrated by a proper construction of the contract, and particularly of section 8, paragraph (*e*) thereof, entered into between the Postmaster General and the telegraph company. In making this interpretation, it is necessary to determine (1) the purpose and meaning of the contract, and particularly of section 8, paragraph (*e*) thereof, and (2) the legality of section 8, paragraph (*e*), of the contract in so far as it submits the rights of the United States to the courts for adjudication.

Considering these propositions in the order stated, we first inquire as to the purpose and meaning of the contract between the Postmaster General and the telegraph company, and particularly of section 8, paragraph (*e*) thereof.

In the joint resolution of Congress of July 16, 1918, authorizing and empowering the President to take possession and assume control of the wire systems, it was distinctly provided "that just *compensation* shall be made for such supervision, possession, control, or operation, to be determined by the President." The system of Western Union Telegraph Company was taken over pursuant to the proclamation of the President on August 1, 1918, and thereafter, on October 9, 1918, it submitted to the Postmaster General a proposal wherein it offered "to accept a just *compensation* for the supervision, possession, control, and operation" of its telegraph system "to be fixed" as set out in detail in the proposal (Transcript, Exhibit 4, pp. 41-51). Among the elements of the just *compensation* thus proposed by the owner was the provision for indemnity against judgments or decrees rendered against it on causes of action "arising out of Federal control," appearing as section 8, paragraph (*e*), of the contract (Transcript, p. 46). The contract was completed by an acceptance of the proposal by the Postmaster General in these words:

> "The proposal of the Western Union Telegraph Company, dated October 9, 1918, *with respect to just compensation* for the use of the properties owned by them during the period of Federal control * * * is hereby accepted on behalf of the United States, and *compensation* will be paid in accordance with the terms and provisions thereof." (Italics added.)
>
> (Ex. 4, Transcript, p. 41.)

Under the facts, therefore, as well as under the decisions in *Dakota Central Telephone Co. vs. South Dakota ex rel. Payne*, 250 U. S., 163 (63 L. Ed., 910), and *Krichman vs. United States*, 263 Fed., 538, construing precisely similar contracts, the sole object and purpose of this contract was to provide for *compensation* to, not liability against, the owner for the use of its property by the United States.

Having ascertained the purpose of the contract, it is next in order to inquire as to the meaning and reason for the provision for indemnity against judgments and decrees found in paragraph (*c*) of section 8.

It is quite obvious that this provision is *no affirmative grant* of a right to sue *anyone* on a "cause of action arising out of Federal control." On the contrary, in so far as the right of suit is concerned, it is wholly negative, its plain primary meaning being that either in the event suit should be entered against the owner corporation on a cause of action arising out of Federal control and a recovery defeated, or in the event that such suit should be entered and a judgment recovered, then in the first case the expenses incident to the defense of the suit, and in the second case the judgment and the expenses incident thereto should be treated as liabilities of the United States, and *should not be deducted out of the compensation* to be paid to the owner for the use of its property by the United States.

Manifestly, therefore, the purpose of the provision was *not* to give a right of action, but *to provide for contingencies*, viz., either the contingency of the owner being compelled to de-

fend at its own *expense* suits against it on causes of action arising out of Federal control, or the contingency of ultimate *liability* against the owner on such causes of action being found by the courts to exist either by virtue of then existing law or of law subsequently to be enacted.

At the time the telegraph company's system was taken over by the United States, and for many years prior thereto, suits against such company were of daily occurrence in the various State and Federal courts throughout the country. It was evident at the outset that parties with grievances, real or fancied, growing out of transactions had in the conduct of the telegraph business, would not cease bringing these suits merely because of the President's proclamation, and that some one would have to defend such suits when they were brought. But if the suits were brought against the telegraph company, clearly it would be compelled to defend or else suffer a recovery against it by default. Whether it ultimately won or lost, such company would have to pay its attorneys' fees and at least some part of the court costs and disbursements. When it is recalled that experience extending over a long period of years had established the fact of an annual average of more than one thousand of these suits, it is quite apparent that the aggregate annual cost of defending, and of ultimately defeating many of them in which adverse initial judgments should be rendered, would be enormous. Hence the telegraph company faced the practical consideration of the necessity for making provision for the expense of defending suits brought against it on causes of action arising out of Federal control, regardless of its success or lack of success in defeating a recovery against it in such suits. In fact, as the company knew from experience, the annual expense of defending suits practically equalled the amount paid out in satisfaction of judgments; so it was quite as important to have the Postmaster General agree to take care of the expense of the suits as it was to have him agree to pay the judgments. To meet and provide for this con-

dition must therefore be considered the first object of this paragraph of the contract, which expressly requires the Postmaster General to "pay * * * all expenses incident to or growing out of the possession, operation, and use of the property," as well as "all judgments or decrees." Without such a provision, judgments would have been obtained against the telegraph company on causes of action "arising out of Federal control" and the United States would have been under no obligation to reimburse such company for the expenses incurred by it in employing counsel and otherwise in order to be rid of such judgments.

The two other practical considerations confronting the telegraph company at this time were the doubt as to whether the court would decide that such company could be held liable under the provisions of the joint resolution, and the possibility of the subsequent enactment by Congress of a valid law establishing such liability. As to liability under existing law, it must be borne in mind that at this time this court had neither construed the proviso of the joint resolution saving the "lawful police regulations of the several States," nor determined the status existing among the United States, the several States, and the telegraph company under the action of the President exerted pursuant to the authority of the joint resolution, and that it was not until some eight months thereafter that these questions were settled in the *Dakota Central Telephone Co. case, supra*. Not only, however, was there this uncertainty as to the right to sue the owner "on causes of action arising during Federal control" under existing State laws, but there was like uncertainty as to what action Congress would take in the future looking to giving a right of action in such cases against the owner corporations. No doubt the officers of the telegraph company as well as of the United States knew that a proposal to give such a right had been rejected by Congress when the joint resolution had been adopted, but this was no guarantee that it would not enact it in future; and in fact they must have known that was pre-

cisely what Congress had done with respect to railroads in enacting section 10 of the Federal control act of March 21, 1918, which was passed long subsequent to the action of Congress and the President under which the railroad systems were seized. Actuated, therefore, by the certainty of being forced to incur expenses in the defense of suits brought against it on causes of action arising out of Federal control and by the further fear of liability being held by the court to exist, either by virtue of State laws not superseded by the action of Congress and the President, or by laws subsequently enacted by Congress, it was but natural that the telegraph company, in submitting a proposal for just compensation for the use of the property of which it had been deprived, should include a demand that it be indemnified by the United States against the expense of such suits and the effect of all judgments recovered therein. By making this demand, the telegraph company neither admitted nor intended to admit liability on such causes of action, either under the law as it then stood or as it might be thereafter enacted, but realizing the certainty of incurring expense in defending suits and the contingency of a ruling by the courts or an enactment by Congress making it liable in such suits, it merely, out of the abundance of caution sought and obtained from the United States an agreement to indemnify and save it harmless from all such suits and judgments. In brief, the purpose of the entire contract is to make just *compensation* to the telegraph company and not to provide a right of action against it for the defaults of the agents of the United States; while the object and meaning of section 8, paragraph (*e*), of the contract is merely to provide for indemnity against the expenses of all suits against the telegraph company on such causes of action and against the judgments and expenses in all such suits wherein a recovery should be had against such company, either by virtue of the law as it then stood or by virtue of subsequent legislation by Congress. But if this be the true interpretation of the contract, and especially of the sec-

tion relied on by the court, it is quite manifest that the conclusion of the court is wholly unfounded, for it is rather difficult, if not impossible, to perceive how a provision inserted in a contract by the first party thereto as a protection against the expense of defending suits brought against it for the acts of the other party and against the possible contingency of a ruling by the courts making such first party liable for the acts of the other party thereto, or the possible contingency of a legislative enactment to the same effect, can be construed as authority to maintain such suits against such first party, especially where the contemplated legislative action has never been taken and where the courts have not only failed to make the contemplated ruling but have so decided as to make such ruling impossible.

From what has been said, it must inevitably follow that the court erred in construing this negative section of the contract as an affirmative grant of power to sue the telegraph company in the State court and pass the judgment therein on to the United States for payment.

This brings us to a consideration of the second reason given above for interpreting the contract as not giving a right to recover a judgment in form against the telegraph company but in effect against the United States, viz: the illegality of section 8, paragraph (*e*), of the contract if construed as an attempt to submit the rights of the United States to the courts for adjudication.

In the case of *Hobbs vs. McLean*, 117 U. S., 567 (29 L. Ed., 940), this court said:

> "It is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted."

We have endeavored to show that the true interpretation of section 8, paragraph (*e*), of this contract is merely that in case it be held by the courts that under the then existing

law, or in case it be subsequently enacted by Congress, that a judgment can be rightfully obtained against the owner corporation on a cause of action arising out of Federal control, then and in either event the United States will pay the judgment and not deduct the amount thereof from the compensation agreed to be paid the owner for the use of the property.

As thus construed, the meaning of the contract is clear to all and entirely free from even a tinge of illegality. But if it is to be construed, as the Supreme Court of South Carolina held, and the respondent now contends, as an affirmative grant of authority to bring suit against the telegraph company and collect from the United States the judgment obtained therein, then, as we shall show, such construction is clearly illegal and must be rejected under the principle quoted from *Hobbs vs. McLean, supra.*

The decisions to which we have heretofore referred establish beyond controversy that the United States is the real party in interest in this case. In fact, this much is virtually admitted by the Supreme Court of South Carolina, for it says in its opinion that "the action and judgment therein recovered are *in form* against the Western Union Telegraph Company, yet *in effect* they are against the Postmaster General" (Transcript, p. 61).

As we have already shown, no suit can be maintained, either directly or *indirectly*, against the United States without its consent, and this consent cannot be inferred, but must be given in *express* terms by an act of Congress. It is evident from a mere inspection that the contract does not even purport to give a right to sue the United States, but even conceding, for the sake of argument, that it does, yet this does not help out respondent's contention. The joint resolution of Congress, pursuant to which the contract was executed, neither authorized nor consented to suits against the United States, nor authorized the Postmaster General to enter into any contract wherein such consent should be given. The contract between the Postmaster General and the tele-

graph company is a purely private matter. It certainly is not an act of Congress or a resolution of Congress, neither is it a public or general order of the Postmaster General having the force and effect of an act of Congress. A stipulation in such private contract attempting to give consent to sue the United States is utterly unlike the general orders issued by the Director General of Railroads, with the approval of the President, because the right to make such orders and embrace therein the subject-matter thereof was *expressly given* by act of Congress, while here there was not only no *express* provision, but *no provision at all* in this act of Congress authorizing the Postmaster General to consent to a suit, either directly or indirectly, against the United States. Such being the facts under which it was made, if section 8, paragraph (*c*), of the contract is held to be an attempt to consent to maintain suits against the United States in the State courts, it is illegal and void. This, we submit, is the irresistible conclusion to be deduced from the decisions of this court to which we now refer.

In *Case vs. Terrell*, 11 Wall., 199 (20 L. Ed., 134), this court, in speaking of the extent of the powers of the Comptroller of the Currency, said

> *"He has no authority to subject the United States to such jurisdiction, and to submit the rights of the Government to litigation in any court, without some provision of law authorizing him to do so."* (Italics added.)

Speaking of the authority of the Secretary of the Treasury, this court, in *Carr vs. United States*, 98 U. S., 433 (25 L. Ed., 209), declared:

> "He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the Government. And, in fact, *he had no authority to waive those rights.*" (Italics added.)

In *United States vs. Lee*, 106 U. S., 196 (27 L. Ed., 171), Mr. Justice Miller, delivering the opinion of the court, stated the principle thus:

> "There is vested in *no officer* or body *the authority to consent* that the State shall be sued, except in the law-making power, which may give such consent on the terms it may choose to impose." (Italics added.)

In *Stanley vs. Schwalby*, 162 U. S., 255 (40 L. Ed., 960), suit was brought in a State court of Texas to try title to a part of a military reservation of the United States, and the district attorney, professing to represent the United States and to be acting under instructions of the Attorney General, appeared in the cause and joined in the answer. This court, after holding that the United States had "never consented to be sued in the courts of a State in any case," said:

> "The answer actually filed by the district attorney, if treated as undertaking to make the United States a party defendant in the cause, and liable to have judgment rendered against them, was in excess of the instructions of the Attorney General, and *of any power vested by law in him or in the district attorney*, and could not constitute a voluntary submission by the United States to the jurisdiction of the court." (Italics added.)

Without multiplying quotations, we cite the following directly applicable cases:

The Davis, 10 Wall., 15 (19 L. Ed., 875).
Finn vs. United States, 123 U. S., 227 (31 L. Ed., 128).
Price vs. Abbott, 17 Fed., 506.
Northern Bank vs. Stone, 88 Fed., 413.
Railroad Tax cases, 136 Fed., 233.
United States vs. Pearson, 231 Fed., 270.
Gouge vs. Hart, 250 Fed., 802.
Jacob Hoffmann Brewing Co. vs. McElligott, 259 Fed., 321.
Westbrook vs. Director General, 263 Fed., 211.

In so far, therefore, as anything in the joint resolution authorizing the seizure of the telegraph lines is concerned, the action of the Postmaster General in attempting by section 8, paragraph (*e*), of the contract to consent to suits against the United States on causes of action arising out of Federal control, if it can be construed as such consent, was wholly unauthorized. Hence, when the Supreme Court of South Carolina found that the judgment was "in effect against the Postmaster General," it should have dismissed the case.

But conceding the contract contains a consent to sue the United States, the only statutes under which it could possibly have been authorized were section 145, paragraph 1, and section 24, paragraph 20, of the Judicial Code, wherein the United States has consented to be sued on claims similar to that here involved either in the Court of Claims or the district court, the court of any particular suit to be determined by the amount in controversy. Section 145, paragraph 1, of the Judicial Code provides:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters: First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same."

And section 24, paragraph 20, of the Judicial Code is as follows:

> "The district courts shall have original jurisdiction as follows:
>
> * * * * * * *
>
> "20. Concurrent with the Court of Claims, of all claims not exceeding $10,000, founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."

These sections had been long on the statute books at the time the joint resolution was adopted, and no doubt the knowledge of their existence and the completeness of the remedy they afforded were the determining factors that influenced Congress not to encumber the joint resolution with additional provisions as to suits.

Not only, however, has it been settled by this court that authority to sue the United States, directly or indirectly, must be *expressly* given by an act of Congress, but it is equally well settled that the grant of a right to sue the United States, even when expressly given by Congress, must be construed in strict accordance with its terms. Thus in the recent case of *Illinois Central Railroad Co. vs. Public Utilities Commission*, 245 U. S., 493 (62 L. Ed., 425), Congress had given permission to sue the United States, but only in designated judicial districts. The plaintiff brought his suit in a district other than that in which the act of Congress had authorized suit, and this court, holding that the terms of the grant to sue must be absolutely followed, dismissed the complaint.

Among the numerous cases applying the principle, we refer the court to:

Beers vs. Arkansas, 20 How., 527 (15 L. Ed., 991).
Nicholl vs. United States, 7 Wall., 122 (19 L. Ed., 125).
Schillinger vs. United States, 155 U. S., 162 (39 L. Ed., 108).

The consent to sue the United States, if it be such, found in section 8, paragraph (*e*), of the contract, must therefore, by force of this principle, be construed in connection with section 145, paragraph 1, and section 24, paragraph 20, of the Judicial Code, the only statutes under which it could have possibly been authorized. So construed, the consent gave *absolutely no authority* to maintain in *any State court* this suit in which the United States was the real and sole party in interest. The plaintiff's rights, if rights he had, could only be determined by the district court or the Court of Claims of the United States, as they, and they alone, were vested with authority and jurisdiction to render a judgment effective against the United States as the real defendant in the action.

In the recent case of *Heil vs. United States* (District Court, New York, decided June 15, 1920, not yet reported), the plaintiffs brought suit against the United States in the District Court for the Southern District of New York to recover for the loss sustained by failure to transmit a cable message for the purchase of pounds sterling on the London exchange. The Government contended that it was not liable to the plaintiffs for failure to transmit the message, but this contention was denied by the court. The opinion is so pertinent to the present issue that we set it out in full as Exhibit "C" in the appendix hereto.

In the precisely analogous cases of *Belknap vs. Schild* and *Wells vs. Roper*, *supra*, this court held that the suits could not be maintained, but that the parties must, under the Fed-

eral statutes which now appear as section 145 and section 24, paragraph 20, of the Judicial Code, be remitted for relief to the Court of Claims or the District Court of the United States. These cases are conclusive here, and render further discussion unnecessary.

From these considerations we are forced to the conclusion that there is no warrant for holding, as the State court has done, that the contract allows the recovery of a judgment in form against the owner but in effect against the United States, and from such conclusion it must follow that the judgment is inoperative against the United States, and if effective at all, is effective against the telegraph company.

III.

CONSTITUTIONAL OBJECTIONS TO THE MAINTENANCE OF THIS SUIT AND THE RECOVERY OF A JUDGMENT THEREIN EFFECTIVE AGAINST THE OWNER TELEGRAPH COMPANY.

As we have seen, the judgment is ineffective against the United States, the party *really* liable; but it is in *existence* and is *in form* against the telegraph company; hence until reversed by competent authority, it is both *effective* and *enforcible against the telegraph company*. The question, then, is, can a judgment against the telegraph company under the facts of this case, for a liability wholly of the United States, stand under the provisions of the Fifth and Fourteenth Amendments to the Federal Constitution?

In determining this question it becomes necessary to consider and ascertain the rights of the telegraph company and the application thereto of each of the constitutional amendments in question. Hence we inquire as to

1. Due Process of Law under the Fifth Amendment.

The Fifth Amendment to the Constitution of the United States declares that "no person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." This amendment is a direct limitation on the powers of the Federal Government and is here invoked as applicable to any authority to institute this suit and recover a judgment against the owner corporation by virtue of a grant exerted under the authority of an act of Congress.

Vast as are the powers of the United States in time of war, yet these powers are not so extensive as to authorize the violation of any of the provisions of the Constitution. In the leading case of *Ex parte Milligan*, 4 Wall., 2 (18 L. Ed., 281), this court declared the principle in these words:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false."

To the same effect are:

The Legal Tender Cases, 12 Wall., 457 (20 L. Ed., 287).

Hamilton vs. Kentucky Distilleries, etc., Co., 251 U. S., 146 (64 L. Ed., —).

Had Congress therefore attempted even by statute to confer upon the respondent in this case a right of action against the telegraph company for the obligations of the United States in its management and operation of the telegraph sys-

tem, its action would have encountered these prohibitions of the Fifth Amendment against the taking of private property without due process of law. Consistently with due process of law, private property can only be taken for public use, and only then when necessary for the paramount purposes of the Government, and even this right cannot be exercised except upon payment of just and adequate compensation.

> *United States vs. Cress*, 243 U. S., 316 (61 L. Ed., 746).

Hence, where the private property of the telegraph company is made subject to the satisfaction of a demand due by the United States to an utter stranger to such company, it is manifest not only that such property is being used for the purpose of paying a debt of the United States for which the company is not responsible, but also is being devoted to the private use of such stranger in making payment of his demand.

As we have heretofore shown, no authority whatever for bringing this suit against the telegraph company can be found in the action either of Congress or of the President, the respondent basing his claim to such right solely on a supposed authority conferred by the Postmaster General in the contract for compensation entered into between him and the company. This action of the Postmaster General, granting to it the scope and effect urged by the respondent, was, under the decisions of this court, wholly *ultra vires* if it was intended to confer jurisdiction of an action like this on a State court. But waiving this contention and assuming that Congress granted this official such authority, the result must be the same, and for the reason that the action, whether authorized or unauthorized, in so far as it contemplates the recovery of a judgment against the telegraph company in a case like this is a denial of due process of law. In defining the scope and meaning of this provision of the Constitution,

this court, in the recent case of *Ochoa vs. Hernandez*, 230 U. S., 139 (57 L. Ed., 1427), said:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (2 Coke, Inst., 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

To permit this suit to be maintained against the present defendant for the acts of the Government, for which acts, as has been shown, it was in no way responsible, would be in direct violation of this last statement of the principle of due process of law, for it would certainly be the taking of its property to pay the debts of another contrary to all the settled usages of our jurisprudence. As was once well said by the late Mr. Justice Peckham:

> "There are some things so contrary to justice as to admit of no doubt of their utter illegality, such as the arbitrary taking under the form of a legislative enactment, of the property of one man and bestowing it upon another."

The decisions construing the acts of Congress and the proclamation of the President demonstrate to a certainty that at the time this cause of action accrued the property of the defendant was being operated by the United States, and therefore that the liability sought to be enforced in the complaint was that of the Government. However, the judgment has been rendered against the defendant as the owner of the property for acts over which it, as a matter of fact, did not

exercise, and, as a matter of law, could not have exercised, any control. The assertion, therefore, that this suit can be maintained against it, despite these facts, is a bald assertion that the owner can be made liable for the acts of the United States irrespective of its connection with the contracts or circumstances out of which the suit arises.

A recent instructive case, holding that such a result cannot be accomplished under the constitutional provision here invoked, is *Daugherty vs. Thomas*, 174 Mich., 371; 140 N. W., 615; Ann. Cas., 1915A. 1163; 45 L. R. A. (N. S.), 699. In that case the court had under consideration a statute of Michigan that made the owner of a motor vehicle personally liable for any accident that might occur from the negligent operation of such vehicle by any person that might be using it with or without the consent of such owner. The court, after making an extended review of the cases, reached the conclusion that the statute in question was clearly unconstitutional, saying:

> "To hold subdivision 3 of section 10 constitutional is to hold a party absolutely liable for the negligent conduct of another, a mere stranger or a wilful trespasser, no matter how careful or free from negligence he himself has been. We think that the result of such holding would be to take the property of defendant Thomas to pay for the wrongful and negligent act of another person not sustaining to him the relation of servant, agent or employee. Such a doctrine seems unnatural and repugnant to the provisions of the Constitution here invoked. We are forced to the conclusion that the provisions of this subdivision are not a necessary regulation in the exercise of the police power; that in and by its terms the plain provisions of the Constitution are violated; and the subdivision must be held unconstitutional, and the statutory liability therein asserted done away with."

The rule is thus tersely stated in 12 C. J., at page 1244:

> "The owner of property, the ordinary use of which is beneficial to the public, cannot be made liable for the negligence of one not a servant or occupying a similar relation."

The use of the defendant's telegraph system by the United States was certainly beneficial to the public, and, as has already been shown, the Government was in no sense a servant, agent, employee, or lessee of the owner. Therefore, this statement of the rule is directly applicable to the facts of the present case.

Other authorities holding that due process of law forbids making one person liable for the debt of another are these:

Cooley, Const. Lim., 7th Ed., 150.

Attorney General vs. Old Colony R. Co., 160 Mass., 62; 22 L. R. A., 112.

Colon vs. Lisk, 153 N. Y., 188; 60 Am. St. R., 609.

Knoxville Traction Co. vs. McMillan, 111 Tenn., 521; 65 L. R. A., 296.

In the latter case, we find this clear statement:

> "The statute arbitrarily imposes upon the traction company liability for this debt of the advertising company and requires it to pay it with its own means. This is a deprivation of property without a hearing or due process of law clearly within the prohibition of the constitutional provision relied upon. This is too obvious for argument, and the property of one citizen can no more be taken to pay a tax or public debt due from another than the private debt of such other person."

The liability of the United States Government, if such liability exists, to the present plaintiff for failure to deliver promptly the telegrams involved in this case, was in no sense a public liability but solely private, or, in other words, a

liability that existed between the Government and the plaintiff alone. If the property of this defendant is to be taken to pay such a debt, it is patent that it would be a diversion of its property to a private purpose and therefore within the inhibition of the due process of law clause of the Fifth Amendment.

In the case of *Missouri Pacific R. Co. vs. Nebraska*, 164 U. S., 403 (41 L. Ed., 489), where a railroad commission ordered a railroad company to furnish a portion of its right of way to individuals for the purpose of erecting a grain elevator, this precise question came before this court and the right to take the property for such purposes was denied by the court, which said:

> "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was in essence and effect a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a State of the private property of one person or corporation without the owner's consent for the private use of another is not due process of law and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

The same principle has been applied in the subsequent cases of:

Missouri Pacific Railroad Co. vs. Nebraska, 217 U. S., 196 (54 L. Ed., 727).

St. Louis, etc., Railroad Co. vs. Wynne, 224 U. S., 354 (56 L. Ed., 799).

Eubank vs. Richmond, 226 U. S., 137 (57 L. Ed., 156).

Chicago, etc., R. Co. vs. Polt, 232 U. S., 165 (58 L. Ed., 554).

Los Angeles vs. Los Angeles Gas, etc., Corp., 251 U. S., 32 (64 L. Ed., —).
Brooks-Scanlon Co. vs. Railroad Commission, 251 U. S., 396 (64 L. Ed., —).
Great Northern R. Co. vs. Cahill, — U. S., — (decided May 17, 1920; not yet reported).

It is suggested, however, that under the contract between the telegraph company and the Postmaster General, such company would have a right of action over against the United States in case it is compelled to pay the judgment, and therefore this removes all constitutional objections. Such a contention finds support neither in reason nor in authority.

A right of action over resulting from the payment of a judgment is based on the fundamental principle that the party against whom it is sought to recover in this latter action was not only legally liable, but also subject to suit in the court which rendered the judgment. But it has been shown that the United States was the real party in interest in this suit and that the court which rendered the judgment was devoid of any jurisdiction in the premises. This being true, the telegraph company, after paying the judgment, would have no legal ground upon which it could make a demand on the United States for reimbursement. Such being the facts, it is clear that the telegraph company, if it paid such a judgment, would not have an absolute right to compensation but only a contingent right which would be subject to be defeated by the United States in the Court of Claims or the district court. To the fact that the right to recover compensation by suit against the Government would be contingent must be added the further fact that even if a right of action existed for such compensation, the relief afforded would be both expensive and inadequate. This results from the reason that there is no authority in the existing Federal statutes for an award, either by the Court of Claims or by

the District Court, of a sum of money in addition to the amount of the claim sufficient to compensate for the expenses incident to the proceeding in such court to enforce the right. Obviously, therefore, even if the face of the claim should be ultimately paid, the expenses incident to its adjudication would necessarily have to be borne by the claimant, and to this extent the recovery would be diminished, which diminution would measure the failure of the remedy to provide just and adequate compensation.

It has been frequently held that even where authority may be exercised for acquiring private property for public purposes, due process of law requires that the compensation must be both certain and adequate. In such cases, the means of securing indemnity must be such that the owner will run no risk. Among the cases applying this principle are:

Attorney General vs. Old Colony Railroad Co., 160 Mass., 62; 22 L. R. A., 120.

Haverhill Bridge vs. Essex County, 103 Mass., 120; 4 Am. Rep., 518.

Louisville, etc., Railroad Co. vs. Central Stock Yards Co., 212 U. S., 132 (53 L. Ed., 441).

But if due process of law is not afforded in a case where property is authorized to be taken, but compensation therefor rests on a subsequent and contingent right of action against another party, for much greater reasons it is not afforded where the taking in the first instance was wholly unauthorized and only a subsequent, uncertain and contingent right of action by way of compensation was left to the owner as his only means of redress. As has been pointed out, the right of action of this defendant against the Government is wholly uncertain and contingent and can be defeated at any time the Government raises the question in the Federal courts where the suit to force the indemnity is brought. This completely destroys all semblance of due process of law

in the contention that the present defendant can be held liable for the acts of the United States in handling the telegrams involved in the present case.

The precise question here involved has recently been considered by one of the courts of New York and by several of the lower Federal courts in suits involving the liability of the transportation corporations for the acts of the United States during the period of Federal control of their properties, and in each of these cases the contentions we here make have been sustained. The language of the case referred to in New York, *Schumacher vs. Pennsylvania Railroad Co.*, 106 N. Y. Misc., 564; 175 N. Y. Supp., p. 84, is so pertinent that we quote at length:

> "If our view and construction of the statute in question is correct, we are face to face with the legal question whether, in so far as it authorizes actions and judgments against carriers for the negligence or default of the Government or its agents, such provisions are constitutional and valid. To state the question is to answer it. We can reach no other conclusion than that in that respect Congress has exceeded its constitutional powers. It is repugnant to the great underlying principles of our jurisprudence and violates, we think, the express provisions of the Fifth Amendment to the Federal Constitution, declaring:
>
> "'No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'
>
> *"Certainly the taking of the property of a corporation to pay the debt or liability of the Government, for which the corporation is in no way responsible, violates this provision of the Constitution, and deprives it of the equal protection of the law.*
>
> "It probably was the intention of the framers of the statute that the Government should ultimately pay all such demands as in justice and by right it should. It is impossible to believe that the contrary was in their minds, but the statute nowhere so provides. If

the carrier were compelled to pay the judgment thus sought to be entered, it would undoubtedly have a just demand against the Government to be reimbursed for moneys so paid, but the fact that such a demand exists in no way cures the statute of the infirmity of unconstitutionality. *The taking of the property of one to pay the debt of another is none the less illegal, even though the party wronged may assert his right for compensation. The condemnation is against the illegal taking, and the violation of this constitutional guaranty is not cured by the possibility of future restitution.*

"It is urged by plaintiff's counsel that the United States, like every sovereign Government, has the inherent power to take private property for public use (*United States vs. Jones*, 109 U. S., 513; 3 Sup. Ct., 346; 27 L. Ed., 1015), and that this right is not dependent upon any provision of the Constitution for its exercise (*Boom Co. vs. Patterson*, 98 U. S., 406; 25 L. Ed., 206); and it is argued that the exercise of this right, as provided by section 10 of the act of March 21, 1918, is simply an exercise of such a power and cannot be questioned, particularly as it is in the nature of a war measure and in aid of a vigorous prosecution of the war. *The act*, however, under consideration, goes further, in that it *provides*, not *for the taking* of the defendant's property by the Government itself, but *by a third party to pay a Government liability, the enforcement of a liability against a party in no way legally responsible for it.* To carry the argument to its logical extent, it might with equal propriety be urged that Congress had the right to authorize actions against private individuals for the payment of Government bonds.

"*We can reach no other conclusion than that the act of March 21, 1918, in so far as it authorized judgments against carrier corporations for the default or liabilities of the Government, violates the Federal Constitution, providing against the taking of private property 'without due process of law.'*" (Italics added.)

In *Hatcher & Snyder vs. Atchison, etc., R. Co.*, 258 Fed., 952, the court said:

> "The plaintiffs' contention is based at last upon section 10 of the act of March 21, 1918 (Comp. St., 1918, sec. 3115¾*j*). My view as to the part of that section relied on is so clearly expressed in *Vaughn's case*, 81 South., 417 (Alabama Court of Appeals, March 18, 1919), cited in the plaintiffs' brief, that I quote the language used:
>
> "'The only authority for suing a carrier while under Federal control must be rested upon the act of Congress which subjects them "to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law," with certain exceptions and provides that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," etc. U. S. Comp. Stat., 1918, pp. 456-458. And *the validity of this statute is sustainable on no other theory than that the transportation companies are operating their respective systems under Federal control. If such companies are in no way connected with the operation of their respective transportation systems, we submit that it would not be within the power of Congress to subject them to liability and suits thereon for the torts, miscarriages, and defaults of the employees of the Federal Government. Such an act would be an arbitrary exercise of legislative power contrary to the established principles of private rights and distributive justice and tantamount to a denial of due process of law. Zeigler vs. S. & N. A. R. R. Co.*, 58 Ala., 594; *Mobile Light & R. R. Co. vs. Copeland & Sons*, 15 Ala. App., 235; 73 South., 131; *Bank of Columbia vs. Okley*, 4 Wheat., 235 (4 L. Ed., 559); *Hurtado vs. California*, 110 U. S., 516; 4 Sup. Ct., 111, 292; 28 L. Ed., 232; *Dent vs. West Virginia*, 129 U. S., 114; 9 Sup. Ct., 231; 32 L. Ed., 623; *Leeper vs. Texas*, 139 U. S., 462; 11 Sup. Ct., 577; 35 L. Ed., 225; *Giozza vs. Tiernan*, 148 U. S., 657; 13 Sup. Ct., 721; 37 L. Ed., 599; *Jones vs. Brim*, 165 U. S., 180; 17 Sup. Ct., 282; 41 L. Ed., 677; *Maxwell v. Dow*,

176 U. S., 581; 20 Sup. Ct., 448, 494; 44 L. Ed., 597; 6 Rul. Cas. Law, pp. 433-446, embracing paragraphs 430 to 442, on Constitutional Law.

" 'On the other hand, if the carriers are operating under Federal control and are agencies of the Government, the authority of Congress to impose liability on the carriers for the torts of their employees is clearly sustainable on the theory that such responsibility encourages caution on the part of the carriers and their employees, promotes efficiency and safeguards the interests of the Government and the general public.

" 'There is no proof in this case that the Railroad Administration, in the exercise of Federal control, has excluded the transportation companies from the exercise of their functions in the operation of their respective systems, and we cannot assume that it has done so contrary to the manifest purpose and spirit of the authority conferred by the act of Congress and the proclamations of the President.'

"*That court, however, appears to have taken the view that the congressional acts only authorized a superintending control and management* by the Government of the companies and their roads, and expressly said that there was no evidence in the case before them showing that the companies had been excluded 'from the exercise of their functions in the operation of their respective systems,' which *is not in accord either with the construction of the acts given in the North Dakota case nor with the actual facts now of common knowledge. Certainly there is no power in Congress to make A liable and suable for the acts of B. Fundamental principles of justice cannot be overturned by legislative fiat, to say nothing of constitutional guarantees.*" (Italics added.)

As has been shown in the discussion of the present case, the telegraph company did not operate its system under Federal control; therefore under the reasoning employed by the court in the case just quoted, an attempt on the part of Congress to hold it liable would be an arbitrary exercise of legis-

lative power and would be prohibited under the due process of law clause of the Fifth Amendment.

In *Haubert vs. B. & O. R. Co.*, 259 Fed., 361, the court said:

> "Manifestly it seems to me that in view of these conditions no liability exists against the railroad company itself for a personal injury due to operation under Federal control, and that no judgment can be rendered therefor which will become a lien upon the corpus of its property or payment compelled therefrom. *If this were done, the result would be that one person's property would be taken without his consent and without compensation to pay the debt of another.*" (Italics added.)

And in *Nash vs. Southern Pac. Co.*, 260 Fed., 280, we find this clear statement by the court:

> "But that it was intended as the purpose of section 10, as urged by plaintiff, to authorize suits against the owners of these properties in causes of action arising out of transactions had with the Federal Railroad Administration, or through torts committed by its agents while under its control—things for which, we repeat, *the owners could be in no way responsible*—may not for a moment be indulged; *such a construction would clearly render the provision obnoxious to the objection of authorizing the taking of property without due process of law, a purpose which may not be imputed to Congress.*" (Italics added.)

Again, in *Westbrook vs. Director General*, 263 Fed., 211, it is said:

> "If liabilities arising during Government operation are to be recognized at all, manifestly they should be recognized as liabilities of the United States, at least to the extent that the 'revolving fund' would pay them, while *to make them liabilities of the owning companies would be unconstitutional;* for the war power itself is subject to other applicable constitutional provisions." (Italics added.)

In the recent case of *Lane vs. Hines* (District Court, E. D. of S. C., decided August 30, 1920, not yet reported), which was a suit to recover damages for injuries sustained in a derailment on a railroad operated by the defendant, the court construed section 10 of the Federal Control Act applying to the transportation companies and held that if such act created liability against these companies for the acts of the United States, it was clearly unconstitutional. The language is so pertinent that we quote at length:

> "If the meaning of the language of this provision could be construed to mean that the former carriers, the original owners, who had been ejected from their possession, were liable for and could be sued for the negligence or dereliction of the United States, while operating the railroads, the act would be plainly unconstitutional. *There is no power in the United States, under the Constitution of the United States, that would permit it to eject a man from the possession of his property and take entire control and possession of that property and operate it for the benefit of the United States, and under the orders and control of the officers of the United States, and for the purposes of the United States, without the former owners having anything whatsoever to do with its operation or any power of control over it, and then hold the former owners liable for the negligence of the officers or employees of the United States.*
>
> "*Any such enactment would upon the face of it be wholly unconstitutional and in derogation of constitutional right.* The only logical and constitutional construction that can be given to the language of this section 10 is that it is meant to apply to any actions or suits that may be brought against the former owners for any acts of theirs arising in any way not inconsistent with the provisions and the requirements of the act; that in any such action the carrier shall still be continued to be responsible.
>
> "The present action is not one of those. It is an action brought directly against the Director General for the negligence of his own employees, who are the

employees of the United States, operating this property in the possession of the United States, for the benefit of the United States. Any fund that proceeded from this operation is expressly declared to be the property of the United States, and any liability accrued by reason of and during that operation should reasonably and justly be paid by the United States.

"The object, therefore, of the present action at law is to fasten a liability upon the United States for the acts of its employees, which is to be paid out of the funds belonging to the United States, and the only construction to be given to the language of section 10 consistent with the provisions of the United States Constitution is that thereby it was intended to mean that persons injured or having claims arising out of the operation of these railroads could enforce a recovery on those claims by an action against the proper officer responsible for the operation.

"Such appears to have been the construction placed upon the statute by the Director General himself, for by General Orders 50 and 50*a*, instructions were given that all actions to be brought for injuries suffered from the operation of these railroads while in the possession of the Director General, should be brought against him as Director General of Railroads, and not against the railroad company whose property was in his possession, and on which property or by the use of which the accident might at the time have happened." (Italics added.)

In the light of these principles, the only conclusion possible is that if authority to maintain this suit against the telegraph company has been given in any way by Congress, such attempted grant of power is a denial of due process of law and therefore forbidden by the Fifth Amendment.

2. Due Process of Law under the Fourteenth Amendment.

The Fourteenth Amendment to the Constitution declares that *no State* shall "deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

As we have shown, there is no warrant in any action of Congress for bringing this suit against the telegraph company, the provision of the contract entered into with the Postmaster General, respecting indemnity, being wholly insufficient for this purpose. The *existence of the judgment* against the telegraph company and *its effect* against such company *result wholly from the action of the State courts* in reading a provision for liability into the joint resolution and do not rest in any way on any exercise of Federal authority. But under the decisions of this court, the inhibitions of the Fourteenth Amendment extend to and control the State courts as well as other branches of the State government; hence this attempt on the part of the State courts of South Carolina to create by judicial legislation liability against the telegraph company where none could otherwise exist is a denial of due process of law within the meaning of the constitutional provision. Conclusive authority for this position is found in the decisions of this court

Thus in *Chicago, etc., R. Co. vs. Chicago,* 166 U. S., 226 (41 L. Ed., 979), the law is declared in these words:

> "The prohibitions of the Fourteenth Amendment extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities. * * * A State may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that *its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form.*" (Italics added.)

In this case, the telegraph company was afforded a hearing in the State courts and of this it does not complain. On

the contrary, it insists that its rights have been taken away by the *substance that was denied* in such trial, that is, the *substantive right it possessed of immunity from suit and freedom from liability* for the acts of the United States, in which it had no interest and over which it had no control.

In *Raymond vs. Chicago, etc., Traction Co.*, 207 U. S., 20 (52 L. Ed., 78), this court held the action of a State board of equalization unconstitutional as a violation of the Fourteenth Amendment. In the course of the opinion the court said:

> "The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that whoever, by virtue of public position under a State government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition."

In the case of *Western Union Tel. Co. vs. Ferguson*, 157 Ind., 64; 60 N. E., 677, we find this pertinent statement:

> "Denial of equal justice, wrongful discrimination between persons in similar circumstances is as vicious in judge-made as in statutory law."

As authority for the proposition just quoted, the court cited, among other cases, the decision of this court in *Yick Wo vs. Hopkins*, 118 U. S., 356 (30 L. Ed., 220). The same principle has been stated and applied in numerous cases, among which may be cited:

Ex parte Virginia, 100 U. S., 339 (25 L. Ed., 676).

Chicago, etc., R. Co. vs. Minnesota, 134 U. S., 418 (33 L. Ed., 970).

Scott vs. McNeal, 154 U. S., 34 (38 L. Ed., 896).

Home Tel., etc., Co. vs. Los Angeles, 227 U. S., 278 (57 L. Ed., 510).

In discussing the effect of the guarantees of the Fifth Amendment we have shown that had such liability resulted from anything authorized by an act of Congress it would have been a denial of due process of law. In so far as these two amendments are concerned there is no difference in principle between an unconstitutional act on the part of Congress and an unconstitutional act on the part of the State; therefore in the light of the principles declared by the decisions referred to this creating of liability against the telegraph company by the action of the judicial authority of the State of South Carolina is wholly unwarranted and operates to deprive the telegraph company of its property without due process of law.

From what has been said it follows that this judgment, by reason of the protection thrown around the defendant by the Fifth and Fourteenth Amendments to the Constitution, cannot be enforced by the collection of the same out of its property.

CONCLUSION.

The sole issue in this case is the liability of the telegraph company for the acts of the agents of the United States in the operation of the telegraph system owned by such company, but from which it was completely excluded by the paramount authority of the United States.

That such liability does not and cannot exist we have endeavored to demonstrate in this discussion. Beginning with the seizure of the company's lines under the authority of Congress, and the status between the United States and the owner resulting therefrom, we ascertained at the outset the fundamental fact of the existence of a relationship of complete and absolute assumption of the possession, control, and operation of the owner's system by the United States, and an equally as complete and absolute exclusion of the owner from all interest or participation therein. Premising the discus-

sion on the relationship so established, we have successively shown that the owner could not as a matter of fact be liable for the acts complained of, as it was in no way concerned in either their commission or omission, that such liability could not be deduced either from anything in the congressional or presidential action, or from any applicable principle of law, that the United States was the party really liable, but such liability could not be determined or enforced in this action, as it had not consented to be sued, that the provision of the contract relied on to establish a liability that could be passed on to the United States was wholly without such effect, and finally, that the effect of the judgment was to make the owner liable for acts over which it neither had any control nor for which it was in any way responsible, in violation of the guarantees of the Federal Constitution. Once admit the relationship resulting from the status created between the United States and the owner and the conclusions we have drawn follow as logically as the successive steps in the solution of a problem in geometry, and so following they lead just as inevitably to one, and only one, result—that the Western Union Telegraph Company is not, and cannot be made, liable on a cause of action arising out of the operation of its system by the sovereign Government of the United States.

The judgment of the Supreme Court of South Carolina should, therefore, be reversed, and a reversal is respectfully prayed.

RUSH TAGGART,
FRANCIS R. STARK,
P. A. WILLCOX,
F. L. WILLCOX,
HENRY E. DAVIS,
Attorneys for Western Union Telegraph Company.

APPENDIX.

EXHIBIT A.

1. EXTRACTS FROM CONGRESSIONAL RECORD OF JULY 13, 1918.

Mr. GORE. Mr. President, I offer another amendment, which I send to the desk and ask to have read.

The PRESIDENT pro tempore. The amendment will be stated.

The SECRETARY. It is proposed to add a new section, as follows:

> "That in case the President shall take over any of the properties above described and shall enter into any agreement with the owners, lessees, or operators thereof, all such agreements shall contain, in so far as applicable, the same requirements, conditions and stipulations as to liability to and exemption from taxation and the payment thereof as are prescribed in paragraph 3 of section 1, of an act entitled 'An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' approved March 21, 1918, in respect to the taxation and payment of taxes on the part of common carriers under governmental control."

Mr. GORE. Mr. President, some Senators seem to be under the impression that there will be future legislation upon this subject. The pending joint legislation is final legislation upon that point. It authorizes the President to take over the telegraph and telephone systems. It authorizes him to enter into agreements with them. There will be no occasion for future legislation.

The amendment which I have proposed requires the President to insert in these agreements the provision which was embodied in the act confirming the taking over of the rail-

roads. That measure provided that in agreements entered into by the President with the railroads the war taxes should be paid out of the just compensation of the railroads and all other taxes should be paid out of their gross revenues and should be charged up as an item of expense. If it was wise to insert that provision in the railway act, it ought equally to be inserted in the present joint resolution.

For that reason I offer the amendment.

The PRESIDENT pro tempore. The question is on agreeing to the amendment offered by the Senator form Oklahoma.

The amendment was rejected.

The PRESIDENT pro tempore. The joint resolution is still in Committee of the Whole and open to amendment. If there be no further amendment to be proposed, the joint resolution will be reported to the Senate.

The joint resolution was reported to the Senate without amendment.

Mr. REED. Mr. President, I desire again to offer the amendment which I offered a minute ago, and when it is read I want to say just two or three words about it.

The PRESIDENT pro tempore. The Senator from Missouri offers an amendment, which will be stated.

The SECRETARY. It is proposed to add at the end of the joint resolution the following:

> "The right and privilege of the people and the press, substantially as heretofore enjoyed, to the unrestricted use of said utilities upon fair and equitable terms shall not be interfered with, except that the governmental business may, when deemed necessary, be given precedence over all other business, and rules may be adopted and enforced to prevent the use of said utilities for any disloyal purpose."

Mr. REED. Mr. President, I hope I can get the attention of the Senators just for a moment to this, I think, very important question. I know we are anxious to adjourn; but I

hope that no Senator is going to allow his convenience for a few minutes to affect his vote on an important matter of this kind.

I am sure there is a misunderstanding as to the character of the action we are about to take. This joint resolution authorizes the taking over of these great utilities. There is no requirement of a single word of future legislation. They can be taken over tomorrow morning if this joint resolution is passed and signed tonight, and the subject-matter will have passed from the control of Congress. The only possible chance we would ever have again at this question would be by an independent measure.

When we adopted the legislation touching the railroads—the only legislation that ever did really authorize the taking over of the railroads—we placed in the bill many safeguards. Among other things, we reserved certain powers to the Interstate Commerce Commission. I shall not take your time at this late hour to go into the details of that bill, but this bill as it is now drawn is simply a general authority to take over these utilities.

Mr. President, let me repeat in part what I said a few moments ago and offer an observation or two. At the present time a citizen has the right to the use of these utilities. They can not be denied to him by the proprietors, and why? Because they are public utilities and they are held in trust by the proprietors in part for the public use. Hence every citizen under the common law has the right to demand the service of these utilities and to demand it without discrimination and with a reasonable degree of care and promptness. But when the Government of the United States lays its sovereign hand upon these utilities it absorbs into itself all the rights the public bore to the State, all the rights of the individual citizens of the United States, because the Government stands for and represents all of them in contemplation of law. If then the Government should tomorrow take over these utilities and there is no clause written into the law

which will perpetuate the legal right of the citizen to this service, any citizen can be refused that service and he is totally and absolutely without redress, first, because the public use has been absorbed in the sovereignty itself and, second, because he cannot sue that sovereignty. Nobody can sue the United States of America, except where Congress has expressly granted that permission.

Mr. SHIELDS. Mr. President——

The PRESIDENT pro tempore. Does the Senator form Missouri yield to the Senator from Tennessee?

Mr. REED. I do.

Mr. SHIELDS. I should like to ask the Senator the construction of the last clause in the joint resolution.

> "Provided, further, That nothing in this act shall be construed to amend, repeal, impair or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

The exception, of course, is not relevant to the amendment the Senator from Missouri proposes.

Now, the question I wish to ask is, Are not the rights of the citizens of which the Senator speaks protected by the provision that this measure shall not be construed to amend, repeal, impair, or affect existing laws referring to taxation or the local police regulations of the several States? Is it not a fact that the right of the general public to be served by public utilities, such as common carriers, hotels, telegraph companies, and telephone companies, comes under the police regulation? Are not all the laws, both common and statutory, governing these public utilities police regulations, and must not the public utility render this service, and is not that preserved in the bill?

Mr. REED. If the right of a citizen to send a telegram is

a police regulation it is news to me. The right of a citizen to send a telegram rests upon the common-law principle that these concerns are quasi public in their character, and that having undertaken to serve a public duty of that kind a citizen has a right to employ them.

Mr. SHIELDS. If the Senator will allow me to make a suggestion, is it not a fact that the right is born of the duty imposed upon the public utility company, because the citizen has no property and no interest of any kind in the property or the service of the company except as the police regulation requires the company to do certain things?

Mr. REED. It does not rest on that. Police regulations are for the protection of public morals and of public peace. The other rights are in their nature such as a suit could be brought to enforce.

Police regulations—I read from Black's Law Dictionary:

> "Laws of a State, or ordinances of a municipality, which have for their object the preservation and protection of public peace and good order, and of the health, morals and security of the people."

So, Mr. President, for once the distinguished lawyer and Senator, I think, is in error. The purpose of those who drafted this resolution and wrote the exception to the law was not to preserve any such rights as I am discussing.

Mr. GORE. Mr. President——

Mr. REED. Just one moment, until I finish this sentence. The exception in the bill was intended, first, to preserve those laws which affect taxation, and then it says "or the lawful police regulations of the several States." Neither of them has anything to do with interstate messages. The police regulations of the States, I think, that are referred to here are those rules and regulations which are adopted for the preservation of the public peace of the community. I yield to the Senator from Oklahoma.

Mr. GORE. Mr. President, I think the Senator from Missouri is eminently correct in his interpretation of this clause, and the history of the clause might shed additional light upon the subject. This proviso is imported from the railroad act. It was inserted in that act, of course, to protect the rights of the State over taxation and to protect the police powers growing out of the right of certain States to make regulations with respect to separate cars that ought to be preserved inviolate.

Mr. REED. The Senator means separate cars for white and colored.

Mr. GORE. Yes, sir; that is the origin of that part of the proviso. Of course it has no relation here, but was simply bodily transported into this act.

Mr. SHIELDS. The courts, both Federal and State, have held the laws for the separation of the races on cars and in public places to be police regulations.

Mr. GORE. Certainly; that was my suggestion and it was to preserve that.

Mr. SHIELDS. At common law the regulation of charges upon vehicles, charges at hotels, and many other things were police regulations, and the duty of the common carrier to serve all was held to be a police regulation. Our statutes upon the subject are only supplementary of the common law, applied to the new public utilities that have arisen in latter days.

Mr. REED. Mr. President, the Senator has expressed his view and I have expressed mine. I am not going to be conceited enough to affirm that I am right, but I undoubtedly think I am right. If the right of the citizens to use the telephone is a police regulation and comes under the police regulation it is news to me, but I have frequently found that I run across something I never heard of before and that I have been in ignorance of. But let us assume that the Senator from Tennessee is right, I do nothing in this amendment but reaffirm and reassert a right and make it clear.

When these utilities are taken over the administration of their business affairs will be turned over to a vast multitude of men. It almost always happens that some men put into public position become more or less arbitrary, and if they are under no restraints whatever great damage and injury may be done. I think you make a mistake when you pass this bill and pass it in such a form as to make it as obnoxious as possible. I think it will do no harm to say to the people of the United States your right to use these instrumentalities is fully preserved. I am sure under ordinary conditions and circumstances an amendment of this kind would be accepted. It is not put in here for any purpose in the world except to cover what I believe will be a defect in the law governing these utilities after they are taken over. It preserves a right that all of you expect and wish and hope will be preserved.

Now, Mr. President, I do not care to argue it further for I do not want to take the time of the Senate.

Mr. KNOX. Mr. President, I would like to say one word in regard to the amendment. It seems to me a pity to enact this legislation after this proposition has been made and reject it. It is only writing into the resolution that which is approved as a matter of course. It is not a right in my judgment that rests in the police power. It is a right that grows out of the nature of the service that these corporations offer to render to the general public, and we are only writing into the resolution a proposition that in our opinion no operations of these lines, if they are taken over by the Government, will interfere with that natural right. The amendment contemplates and specifically provides that in any situation where the private right and the Government right conflict the private right must give way. I hope the amendment will be adopted.

The PRESIDENT pro tempore. The question is on agreeing to the amendment proposed by the Senator from Missouri (Mr. Reed).

* * * * * * *

So Mr. Reed's amendment was rejected.

* * * * * * *

Mr. LEWIS. Mr. President, I merely wish now to say that the subject-matter of this amendment respecting the wire companies and the protection of the newspapers and the press will all be taken care of by proper regulations when these companies pass into the hands of the Government. There need be no fear but that they will be taken care of after consultation with the owners and those who are interested.

Mr. PENROSE. Similar to the railroad regulations, I suppose.

Mr. LEWIS. Very similar, because such has been done, I will say to the Senator.

Mr. PENROSE. Increased rates, miserable accommodations for the traveling public, and general scandal and discontent all over the country.

Mr. LEWIS. The accommodation has not been as generous as we should like, but that is because the demands of the war have monopolized opportunity.

Mr. REED. Mr. President, I cannot restrain from expressing the satisfaction I have at the official notice as to just how the business is to be managed.

* * * * * *

So the joint resolution was passed.

2. EXTRACTS FROM CONGRESSIONAL RECORD OF JUNE 10, 1919.

Mr. SHEPPARD. Mr. President, I desire to address a question to the chairman of the committee, the Senator from Iowa (Mr. Cummins). Can the Senator tell me about claims for damages accruing during the period of Government own-

ership? Will the companies be in position to plead that they were Government agencies and therefore secure immunity from suits?

Mr. CUMMINS. Unfortunately, Mr. President, the original act made no provision for bringing suit against the Government. The committee believed that it was not wise to enter upon that subject at this time. Personally my opinion is that if all the systems were under Federal control or in the possession of the Government, no suit would lie against the companies which theretofore had operated them, and that any suit arising out of the operation of the Government would be brought against the Government, and under our law it would necessarily be brought in the Court of Claims.

Mr. SHEPPARD. I have an amendment prepared prohibiting the companies from pleading in suits for damages the fact that they had been Government agencies, but if the chairman of the committee does not think it wise to go into this matter at present I shall not press the amendment.

Mr. CUMMINS. I think there is a general law which confers jurisdiction upon the Court of Claims in such cases.

Mr. ROBINSON. Will the Senator yield for a moment? The chairman of the committee is familiar with the last proviso of the act approved July 16, 1918, which reads as follows:

> "*Provided further*, That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

I do not know what the effect of that provision is, but it was evidently intended to preserve these rights.

Mr. CUMMINS. I think it was intended really to preserve in the States the power or authority of regulation over such

rates. But the Supreme Court of the United States, as yo
will remember, a week ago yesterday declared that notwit
standing that provision in the law the Postmaster Gener
had the full and complete authority to make rates, not on
interstate rates, but State rates as well.

I am inclined to think that would not cover the case of
suit, and anyone who has suffered damage of that kind w
have to seek his remedy against the United States precise
as every other citizen seeks a remedy when the Governme
has wronged him.

Mr. SHEPPARD. Was this matter brought before the co
mittee during its hearings?

Mr. CUMMINS. I do not remember that it was; I cann
recall, but I am inclined to think it was not.

Mr. SHEPPARD. Is it the opinion of the Senator that it
not within the power of Congress to provide that these co
panies may be made responsible in damages by suits of t
character indicated.

Mr. CUMMINS. I do not think you can make the co
panies which formerly operated the properties responsib
for torts committed by the Government; but it is possible
provide—this is a first impression—that suits may be broug
against these companies in the various jurisdictions, and th
any sums paid out by reason of damages recovered could
reckoned as a part of the cost of operation, and in that w
the Government be made responsible for the damages.

Mr. UNDERWOOD. Mr. President, if the Senator will
low me, I desire to say that it seems clear that after the G
ernment took possession of this property any resulting da
ages growing out of the possession of the property lie agai
the Government and not against the owners of the proper
If the Government were to take the Senator's automobile
a war emergency, and the man who was driving the car r
over somebody and injured him, the Senator would not
liable because it was his car, but the Government would
liable because it was its act. Of course, those causes th

arose before the Government took possession still exist against these companies—there is no question about that—but as to anything that arose during Government control and operation these companies have nothing to do with.

Mr. SHEPPARD. But suppose it is provided that any judgment shall be charged to the operating expenses of the systems during the period of Government control and shall be taken out of the receipts during governmental control?

Mr. UNDERWOOD. But you cannot divorce the Government from the right, as it ultimately has to pay. Of course, that would not be making the Government pay because the Government gets the receipts and then pays its lease for the system. If you did that, you might take away the right of the Government to defend itself, and you might have actions lying against the Government that were unjust.

Besides that, I doubt very much whether a clause of that kind would be constitutional. Even if we pass the bill making these companies liable for the unlawful acts of the Government during its operation, and judgment was rendered, would that not be taking private property without due compensation? It would be making an individual pay for an act which the Government or somebody else committed. It seems to me that clearly it is within the scope of the constitutional inhibition against taking private property without just compensation; and even if we put a clause of that kind into the bill, I do not believe it would pass the courts.

Mr. CUMMINS. Mr. President, I hope the Senator from Alabama will not misunderstand me. In the way he has just stated it, it would undoubtedly be unconstitutional; but when the Government comes to pay the compensation due to these various companies during Federal control it must, if it adopts the plan of net income, allow them damages, for they are part of the operating expenses. If a private citizen recovers from a company for damages during that period and it is permitted to charge the judgment into operating expenses, the Government would have to pay it only once, and it would

be entirely fair, although it is open to the objection that the Senator has suggested in regard to the Government having an opportunity to defend. It would have no opportunity to defend against a claim of that kind.

Mr. UNDERWOOD. It seems to me that as to damages for wrong done to individuals during Government control, if there is a just case against the Government during that time, the individual citizen ought to have his opportunity. I am rather inclined to think that the general statutes in reference to the jurisdiction of the Court of Claims are broad enough to cover cases of that kind now; but possibly they are not. If they are not, the jurisdiction ought to be broadened in the Court of Claims, so that the citizen who is injured by the Government during the period of control might have his day in court. It seems to me that is the only place a case would lie.

Mr. SHEPPARD. Does the Senator not realize that it would be a great hardship to have citizens of this country go into the Court of Claims to press their various suits for damages?

Mr. UNDERWOOD. Most of those cases would fall within the jurisdiction of district courts. The district courts have concurrent jurisdiction with the Court of Claims up to $10,000, and where the case involved not more than $10,000 I do not know that any great hardship would be incurred.

* * *

Mr. SHEPPARD. Mr. President, for the information of the Senate I shall ask that the amendment which I have in mind be read in order that it may be incorporated in the Record. I trust opportunity will offer hereafter for the consideration of the question I have presented.

The VICE-PRESIDENT. The amendment proposed by the Senator from Texas will be stated.

The SECRETARY. It is proposed to add after the last proviso in section 1 the following:

> "*And provided further,* That actions on claims for loss and damage on account of the acts or omissions

of the agents and employees engaged in the operation of such systems accruing during the period of control of the same under the joint resolution approved July 16, 1918, may be maintained in courts of competent jurisdiction, and in any such action no defense shall be made thereto that any such telegraph, telephone, marine cable, or radio system or systems was an instrumentality or agency of the Federal Government, and any judgment therein rendered shall be charged to the operating expenses of such systems during such period of governmental control, and compensation made therefor as provided in such joint resolution: *Provided*, That no process, mesne or final, shall be levied against the property of any such system or systems to satisfy any such judgment."

The VICE-PRESIDENT. The question is on the substitute

The amendment was agreed to.

Mr. WATSON. Mr. President——

Mr. CUMMINS. A parliamentary inquiry, Mr. President.

The VICE-PRESIDENT. The Senator will state it.

Mr. CUMMINS. The vote just taken was upon the committee amendment?

The VICE-PRESIDENT. It was upon the committee amendment.

EXHIBIT B.

ORDER No. 2474.

December 12, 1918.

Whereas the Congress of the United States in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives bearing date of July 16, 1918, resolved: That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security

or defense, to supervise, take possession, and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation of the exchange of the ratification of the treaty of peace, and

Whereas, the President of the United States, by his proclamation of the 2d day of November, 1918, declared that he deemed it necessary for the national security and defense to supervise and take possession and assume control of all marine cable systems and to operate the same in such manner as may be needful or desirable, and did, by said proclamation under and by virtue of the powers vested in him by said resolution and by virtue of all other powers thereto him enabling, take possession and assume control and supervision of each and every marine cable system and every part thereof owned or controlled and operated by any company or companies organized and existing under the laws of the United States or any State thereof, including all equipment and appurtenances thereto whatsoever and all the material and supplies, and did also by said proclamation direct that such supervision, possession, control, and operation of said marine cable systems by him undertaken be exercised by and through the Postmaster General, Albert S. Burleson, which said proclamation further directed that until and except so far as the Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers, and employees of the various marine cable systems shall continue the operation thereof in the usual and ordinary course of business of said systems in the names of their respective companies, associations, organizations, owners, or managers, as the case may be, and that from and after 12:00 o'clock midnight on the 2d day of November, 1918, all of the marine cable systems included in said proclamations *shall conclusively be deemed*

within the possession and control and under the supervision of said Postmaster General without further act or notice;

And whereas by Order No. 2351 of the Postmaster General, dated November 18, 1918, it was directed that all of the officers, operators, and employees of the marine cable companies continue in the performance of their existing duties, reporting to the same officers as theretofore, and on the same terms of employment, in which order it was announced to be the purpose to co-ordinate and unify these services so that they might be operated as a national system, with due regard to the interests of the public and the owners of the properties;

And whereas by letter of the Postmaster General, dated December 4, 1918, addressed to Mr. Clarence H. Mackay, president of the Commercial Cable Company, copies of which were transmitted to Mr. George G. Ward, vice-president of the Commercial Cable Company, and to Mr. Newcomb Carlton, president of the Western Union Telegraph Company, it was declared that the interest of the public service during the present emergency necessitated the unification in operation to the fullest extent possible of the cable systems leading from this country to Europe so that the full capacity of all the cables might be available to the public and the press which it was manifest could only be accomplished through the operation of the two systems under one management, and that after having made a survey of the situation and becoming satisfied that the object sought could best be accomplished by placing the cables under the operating head of the Commercial Cable Company, it was directed that Mr. George G. Ward, vice-president of the Commercial Cable Company, assume the management and operation of both the Commercial Cable System and the cable systems operated by the Western Union Telegraph Company;

And whereas in his letter of December 6, 1918, said Newcomb Carlton not only acquiesced for his companies in the aforesaid directions for unification in operation of the two cable systems under said George G. Ward, the operating head

of the Commercial Cable Company, but pledged his hearty co-operation therein, stating his judgment to be that such unification would result in an increase in the total daily capacity of the cables comprising the two systems, and also in important economies in operation;

And whereas in his letter of December 11, 1918, Mr. Clarence H. Mackay, president of the Commercial Cable Company, advised the Postmaster General that said George G. Ward has taken no step to unify the properties by taking possession of the cables controlled by the Western Union Telegraph Company, and has no intention of doing so;

And whereas in his said letter of December 11, 1918, the said Clarence H. Mackay, president of the Commercial Cable Company, has shown the hostility of the officials of the said company to any plan of unification of operation of the cable systems, and said Ward has declined to comply with said instructions of the Postmaster General of December 4, 1918, and

Whereas, the public interests require that the operation of the said cable systems be unified not only for improvement of service, but also that important economies in operation may be effected during the period of Government control which can be accomplished only by placing such unified operation under the management of persons in complete accord with the ends desired,

Now, therefore, it is ordered and directed that so much of the said Order No. 2351 as directs all of the officers, operators, and employees of the marine cable companies to continue in the performance of their present duties, is modified so as to exclude Clarence H. Mackay, George G. Ward, and William W. Cook from any connection with the supervision, possession, control, or operation of any and all marine cable systems or any part thereof, the supervision, possession, control, and operation of which was taken over and assumed by the President in his said proclamation of November 2, 1918, and said Newcomb Carlton is hereby directed to assume the

management and operation of each and all of the marine cable systems, the supervision, possession, control, and operation of which was taken over and assumed by the President and by him directed to be exercised by and through the Postmaster General so far and to such extent as is authorized by the said joint resolution of Congress and the said proclamation of the President. The said Carlton will proceed at once to the execution of this order and shall carry into effect directions which have been given for the unification of the operation of said cable systems and such other directions hereafter to be issued.

A. S. BURLESON,
Postmaster General.

EXHIBIT C.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

L. 21-49.

ALFRED W. HEIL and JOSEPH S. HEIL, Co-partners Trading under the Firm Name and Style of Heil & Co.,

against

UNITED STATES OF AMERICA.

Demurrer to a Petition under the Tucker Act for Failure to Allege Any Cause of Action.

The petition alleges the President's seizure of the marine cables of the Commercial Cable Company on November 2, 1918, under the war power and his consequent operation of them and that during the time of such operation the plaintiffs paid the proper tolls and delivered to "Commercial Cable

Company" as an "agency" of the United States, a cable message to be sent to London, which "the company," *i. e.*, the Commercial Cable Company, promised to transmit. That "the respondent," *i. e.*, the United States, never transmitted the message at all and because of that failure the plaintiffs lost. The message was for the purchase of £100,000 sterling and the loss depended upon fluctuations in British exchange.

J. Julien Sutherland and Peter B. Olney, Jr., for the United States.

Henry Amster, for the petitioner.

LEARNED HAND, *D. J.*:

It is conceded that were these allegations contained in the complaint against the Commercial Cable Company before or after the operation of their property by the President the demurrer would not lie. The question is whether any similar legal duties or obligations resulted during that period. None such can result unless the United States has created them by statute, and the only relevant statute is the Tucker Act, which provides for suits upon "all claims * * * founded * * * upon any contract, express or implied, with the Government of the United States * * * in respect to which claims the party would be entitled to redress against the United States, if the United States were suable. So the parties have correctly presented as the sole question whether the claim is founded upon an express or implied contract with the Government of the United States.

For procedural purposes the failure to transmit or deliver a telegraph message may be made to sound in contract. The company promises, though not verbally, to transmit the message in consideration of the tolls. But quite independent of its promise it is under a duty to accept, transmit and deliver; a duty arises from the statutes which create it or permit its activities. *Ellis vs. American Tel. Co.*, 13 Allen, 226, 232; *Smith vs. W. U. Tel. Co.*, 83 Ky., 104, 113. That duty

makes the promise unnecessary and indeed would make *nudum pactum* a true bilateral contract to receive and transmit a message. The sender, having got no promise to do what the company was not independently bound to do, would have received no consideration. Besides, the terms of the promise are not within the company's pleasure; some things they may reserve, some they may not, depending upon the interpretation of their imposed duties. At best it is merely an *obligato* irrelevant to the melody set by the specific command.

Nevertheless, after the President took over the cables he was under no such duty imposed by law to accept messages, nor was the United States. His decision or the Postmaster General's to accept cable messages as before, however imperatively required for the convenience of the public, was necessarily voluntary, and it is quite conceivable that circumstances should have arisen which would have resulted in their total suspension. This applies as much to every message as to all, there being as little duty imposed upon him to send a given message as to send any class. The right to discriminate between messages was indeed freely exercised during the war at the delegated discretion of the public authorities. The situation was therefore quite changed during the period of governmental operation, and there was no right to send or duty to receive cables except as it arose from the free determination of officers of the United States in the discharge of their duties.

Of course, the Tucker Act is not to be interpreted verbally; nor should I think the fact in any way determinative that the sender of a cable message might sue a telegraph company *ex contractu*. The reason why it seems to me that the act applies here is that if the United States had not the immunity of a sovereign, there would for the foregoing reasons have been no breach of positive duty ("subtraction"), and there would have been a breach of contract. That is precisely the situation which the act was drawn to meet. Con-

gress meant to assume liability for the acts of such of its agents as had the power in the discharge of their duties to assume or refuse engagements upon the faith of which other citizens should rely. It did not mean to assume liability for the proper discharge of duties which it imposed upon those agents by virtue only of positive law.

It was urged at the bar that this result might expose the United States to serious loss and impede it in the discharge of its governmental functions. This is of course an irrelevant consideration when the purpose of the act is clear, but here it is out of place in any event. Whatever be the justification in policy of the sovereign's immunity, the first consideration ought to be this, that in the performance of its voluntary engagements with its citizens it should conform to the same standard of honorable conduct as it exacts of them touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act meant to avoid such consequences.

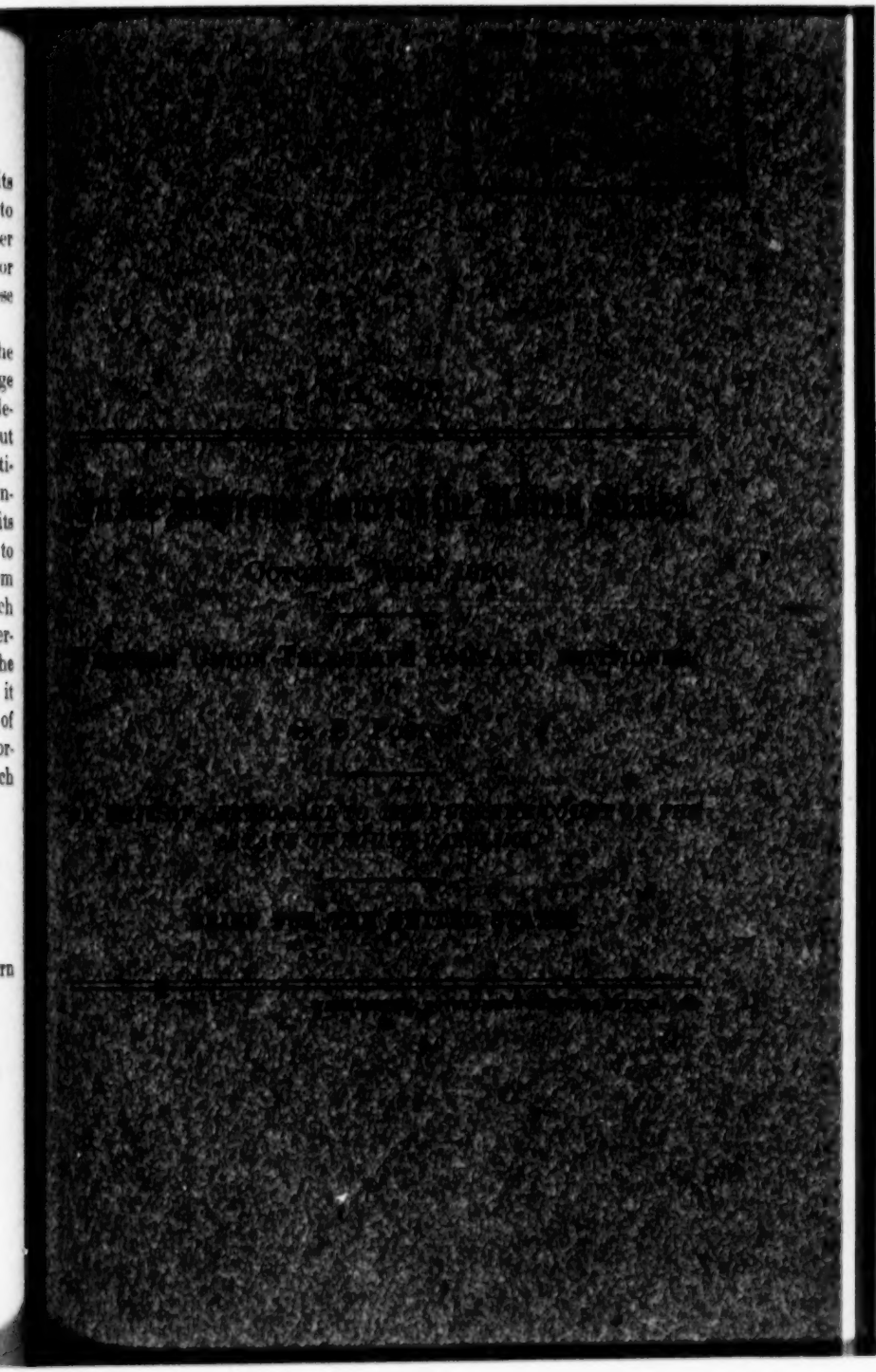
The demurrer is overruled.

June 15, 1920.

A true copy.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.



In the Supreme Court of the United States.

OCTOBER TERM, 1920.

WESTERN UNION TELEGRAPH COMPANY, Petitioner, v. S. B. POSTON. } No. 293.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR THE UNITED STATES.

The question in this case is whether a suit may be maintained against the Western Union Telegraph Company to recover damages occasioned by delay in sending a telegram over the wires of that company after its lines had been taken over by the President pursuant to the joint resolution of Congress and were being operated by the Postmaster General. The company is defending on the ground that since it was not operating its lines it was not a party to any contract to transmit the message or responsible for the negligence of those acting for the Postmaster General.

The United States is directly interested in the result of the suit, for the reason that, as a war measure, the telegraph company was taken over by the President and its lines were being operated under his authority by the Postmaster General. Under the terms of the joint resolution of Congress, the

telegraph company was to be paid fair compensation. In pursuance of this requirement, the Postmaster General entered into a contract to pay such compensation, and, as a part of this compensation, agreed to "save the owner harmless from all judgments or decrees that may be recovered or issued against and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of Federal control or anything done or omitted in the possession, operation, use, or control of its property during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General of the United States." (Rec., p. 46.) If, therefore, the telegraph company is subject to be sued for causes of action arising from the operation of its lines by the Postmaster General, the Government will, of course, be confronted with the claim that it must reimburse the company for all amounts which it shall be compelled to pay as the result of judgments that may be obtained against it as well as for all expenses incurred by it in the successful defense of such cases. It is a matter of importance to the Government, therefore, that suits thus resulting in a liability against it shall not be maintained unless it can be said that the legislation under which the telegraph lines were taken over and operated authorizes such suits.

The questions involved have been so fully and conclusively briefed by counsel for the petitioner that but little remains to be said.

BRIEF.

I.

Nothing else appearing, it is safe to say that one person can not be held responsible for the acts of another over whom he has no control and who is not acting for him.

It is axiomatic, of course, that no one can be held liable except for his own acts or the acts of some one else who, in some respect, is acting for him or under his control, direction, or authority. The brief of counsel for the petitioner demonstrates beyond the shadow of a doubt that the taking over of the telegraph lines by the President was complete and took all control of the operation of these lines away from the owners. In other words, after this taking over, the lines were operated for and on behalf of the United States, the revenues derived accrued to the United States, and the former agents and employees of the telegraph companies became the agents and employees of the Postmaster General, acting for the United States, and were subject alone to his control and direction. The authorities cited by counsel for the petitioner establish all this clearly. The question then is whether the companies owning the telegraphs, which were entitled merely to receive compensation for their use by the United States, can be held liable either for breach of contract or negligence on the part of those employed by the United States to operate them. Manifestly, there can be but one answer to this question, unless the acts of Congress under which the

Government was operating change what would otherwise undoubtedly be the rule.

II.

Congress in providing for taking over telegraph lines had ample power to provide either that the Government should operate them subject to the same liabilities to which the companies if operating them would be liable, or that they should be operated without subjecting the Government to any liability except the payment of fair compensation for their use.

Service to the public in the way of transporting passengers or freight, handling the mail, or transmitting messages, may be rendered either directly by the Government or through public-service corporations. If the service is permitted to be performed by the latter, their liabilities to the public are fixed by the prevailing rules of law. If, however, the Government chooses to itself render the service it may do so on such terms as Congress sees fit to make. Congress may, if it thinks proper, make the Government subject to the same liabilities that a corporation would be subject to in performing the same service and may provide the method for enforcing such liabilities. On the other hand, Congress may authorize the Government to provide such service without incurring any liability whatever to the public. In the case of the Government, moreover, no such liability can be enforced unless Congress has expressly given consent for the Government, or some one representing it, to be sued. From these general statements it is presumed there can be no dissent.

III.

Heretofore, so far as the Government has rendered service to the public, it has done so without assuming the liabilities to which a corporation rendering the same service would be subject.

The rendering of service by the Government to the public without assuming liability for the acts or omissions of its agents is nothing new. The Government has, from the beginning, rendered the service of transmitting for the public from place to place letters and other articles carried in the mails. It demands compensation of all who avail themselves of this service. It has never been thought necessary or proper however, that, on account of demanding this compensation, or for any other reason, it should be held responsible for the loss of valuables or other things from the mails or even for their theft. In other words, it renders the service and the public takes the risk of loss resulting from the negligence or dishonesty of the agents of the Government. No instance is now recalled, prior to the recent taking over of the railroads of the country, in which the Government has seen fit, with respect to any public service it rendered, to assume the same liabilities that a corporation would assume in rendering the same service. If, therefore, Congress saw fit to authorize the Government, as a war measure, to take over the telegraph lines of the country and to operate them with the same freedom from liability that it has always enjoyed in handling the mails, there is no legal ground on which anyone can complain. Indeed, when we

contemplate the very great sacrifices which the public may and must be called upon to make for the successful prosecution of a war, the mere foregoing of the opportunity to send telegraph messages through the medium of some person or company who may be held responsible for their negligent transmission is too insignificant to be of serious consequence. The question, therefore, is whether Congress has expressed an intention that the right to maintain suits such as the present one shall be preserved during the period of Federal control.

IV.

Right to sue reserved by legislation taking over the railroads.

When Congress, during the war, found it necessary that the railroads should be operated by the Government it saw fit to depart from the usual policy that, in rendering public service, the Government should be free from liability for negligence. It therefore very clearly enacted that the operation of the railroads should be on condition that the liabilities attaching to the railroad companies should continue under Government operation. Apparently, it was felt that the dangers incident to railroad operation were such that the individuals suffering from them should have the same protection which they had in times of peace. For this reason, it was expressly provided that, during Federal control, suits might be brought against the companies as before. Of course, any judgments so obtained were

to be ultimately paid by the Government. In effect, then, it was provided that the Government should be subject to the usual liabilities attaching to the operation of railroads by corporations and that this liability might be enforced by suits against the railroad companies themselves. In other words, the right to maintain these suits in this way was given as a means of enforcing a liability against the United States. Under this construction the act would doubtless be held constitutional. Under any other construction, as demonstrated in the brief for petitioner, it will probably be unconstitutional. The point now made is that when Congress concluded that the operation of the railroads should be subject to the usual liabilities, it expressly so provided.

V.

In authorizing the taking over of the telegraph lines Congress did not provide for a continuance during Federal control of the usual liabilities of telegraph companies.

Later, when Congress found it necessary to authorize the taking over of the telegraph lines it was fresh from a consideration of the matters which had led it to require Federal operation of railroads to be subject to the usual liability. It omitted, however, to make any provision for the continuation of such liabilities in the case of telegraph lines. The conclusion is irresistible that this omission was intentional and deliberate. Congress had the option to require the Government to operate the telegraph lines subject to liability just as it was

operating the railroads, or to operate them without liability just as it had always handled the mails. Plainly the sending of messages by wire was much more like sending messages by mail than it was like operating a system of railroads. Congress, therefore, simply authorized the taking over and operation of the telegraph lines, and thereby authorized the Government to carry on that business in the same manner and with the same freedom from liability that it carried on the business of handling the mails. If the carrying on of the telegraph business was to be classed either with the railroad business or with the business of handling the mails, the latter was by all means the more logical and natural classification. No real ground of complaint can exist because, during the period of the war, the Government undertook the transmission of messages both by wire and by the mails and refused, in either case, to make itself liable for the negligence of those whom it must employ for that purpose.

CONCLUSION.

What has been said above is intended merely as suggestions supplementing the argument submitted by counsel for the petitioner. By that argument it has been demonstrated that, after the telegraph lines were taken over by the Government, the companies were not, in any sense, operating them; that such companies could not be subject to suit for the acts or omissions of the employees who had become employees of the Government; and that no act of Con-

gress has subjected the Government to such liabilities as are sought to be enforced in this case, or designated the telegraph companies as agents in whose name the Government may be sued or on whom process may be served for the purpose of enforcing a liability which, if enforced, must be discharged by the Government.

It is respectfully submitted that there is no authority for such a suit as this and that the judgment of the Supreme Court of the State of South Carolina should be reversed.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.

○

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 293.

WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

v.

S. B. POSTON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF SOUTH CAROLINA.

BRIEF OF THE RESPONDENT, S. B. POSTON.

This was a suit at law by S. B. Poston, a citizen of South Carolina, against Western Union Telegraph Company, instituted in the proper court of the State of South Carolina, for damages for negligent delay in transmitting and delivering a series of intrastate messages relating to the sale of cotton.

The defendant below, petitioner here, in its answer pleaded non-liability because of the Government supervision, control, possession, and operation pursuant to joint resolution of Congress and the presidential proclamation.

The issues made by the pleadings were submitted to a jury, which found a verdict for plaintiff. From judgment thereon an appeal was prosecuted to the Supreme Court of the State, which affirmed the judgment of the lower court by an opinion in part as follows:

> "The first question that will be considered is whether there was error in the ruling of his honor the presiding judge that the action was properly brought against the defendant, Western Union Telegraph Company.
>
> "The appellant's attorneys rely upon the joint resolution of Congress, which was adopted on the 16th of July, 1918; the proclamation of President Wilson on the 22d of July, 1918; the order made by Postmaster General Burleson, on the 1st of August, 1918; and on the contract between the Western Union Telegraph Company and the Postmaster General, dated the 9th of October, 1918, which were introduced in evidence by the defendant.
>
> "The joint resolution of Congress authorized and empowered the President of the United States to take possession and control of all telegraph systems, and to operate them in such manner as to him might seem needful or desirable, provided that just compensation should be made for such supervision, possession, control, or operation, to be determined by the President.
>
> "In the President's proclamation he made the following order:
>
> "'It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems, hereby by me undertaken, shall be exercised by and through the Postmaster General, Albert S. Burleson. The said Postmaster General may perform the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems. Until and except so far as said Postmaster General shall, from time to time, by general or special orders, otherwise provide, the owners, managers,

boards of directors, receivers, officers, and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the name of their respective companies, associations, organizations, owners, or managers, as the case may be.'

"The following provisions are in the order made by the Postmaster General:

" 'Pursuant to the proclamation of the President of the United States, I have assumed possession, control, and supervision of the telegraph and telephone systems of the United States.

" 'Until further notice, the telegraph and telephone companies shall continue operation in the ordinary course of business, through regular channels. All officers, operators, and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment.'

"The following provision is in the contract between the Western Union Telegraph Company and the Postmaster General:

" 'The Postmaster General shall pay, or save the owner harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during the period of Federal control. He shall also pay, or save the owner harmless from, all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it, by reason of any cause of action arising out of Federal control, or anything done or omitted in the possession, operation, use, or control of its property, during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General of the United States.'

"While the action and the judgment therein recovered are in form against the Western Union Telegraph Company, yet in effect they are against the Postmaster General.

"The plaintiff followed the mode of procedure directed by the President in his proclamation and or-

dered by the Postmaster General, not only in his order hereinbefore mentioned, but also when he ratified the contract between the Western Union Telegraph Company and himself, which contemplated a judgment in form against the defendant, Western Union Telegraph Company.

"As judgments recovered in actions, in form, against the telegraph companies are to be paid by the Postmaster General, it cannot be successfully contended that the recovery in this case will deprive the defendant of its property without due process of law."

The petitioner then procured a writ of certiorari from this court to review that decision.

The sole question, then, for the consideration of this court may be stated thus:

Can an action at law for damages be maintained against the Western Union Telegraph Company for negligence in handling a private message during the period of Federal control?

In suggesting an affirmative answer to that question and an affirmance of the lower court, we conceive it unnecessary to cite and discuss the great number of State and inferior Federal courts' decisions, since the question to be determined depends upon a consideration of only four documents:

First. Joint resolution of Congress, adopted July 16, 1918 (40 Stat., 904, c. 154).

Second. Proclamation of the President, dated July 22, 1918.

Third. General Order No. 1783, dated August 1, 1918.

Fourth. Contract between the Postmaster General, for the Government, and the Western Union Telegraph Company, dated October 9, 1918, but dating back to August 1, 1918, by express stipulation.

From a consideration of these four documents the question must receive its answer.

The power of Congress to pass the joint resolution must be conceded; but, if not, this court has settled that question beyond the point of further controversy in the Dakota rate cases, in the following words:

> "That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the North Dakota Railroad rate case. And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him."
>
> Dakota Cent. Tel. Co. *v.* St. of S. Dakota, 39 Sup. Ct. Rep., 507.

If Congress had the power and acted under it, it follows that the action of the President in taking over the wire and radio systems under the joint resolution and his proclamation must be read as a part of the joint resolution with equal force and effect.

The joint resolution was predicated upon the making of just compensation to the systems taken over, and conferred upon the President plenary power in this respect, leaving the matter to him for ascertainment and adjustment without any limitations or restrictions to guide or hamper him.

The President exerted the power thus given by proclamation, dated July 22, 1918, wherein he says:

> "It is hereby directed that the supervision, possession, control, and operation of such telephone and telegraph systems hereby by me undertaken shall be exercised by and through the Postmaster General."
>
> "The proclamation gave to the Postmaster General plenary power to exert his authority to the extent he might deem desirable through the existing owners, managers, directors or officers of the telegraph or

telephone lines, and it was provided that this service might continue as permitted by general or special orders of the Postmaster General. It was declared that:

"'From and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems, included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of the said Postmaster General without further act or notice.'

"Under this authority the Postmaster General assumed possession and control of the telephone lines and operated the same. On the 31st day of October, 1918, the President, through the Postmaster General, in the exertion of the duty imposed upon him by the resolution of Congress, to make compensation, concluded a contract with the telephone companies, of the most comprehensive character, covering the whole field while the possession, control and operation by the United States continued. By its terms stipulated amounts were to be paid as consideration for the possession, control, and operation by the United States and the earnings resulting from such operation became the property of the United States. Although concluded in October, 1918, by stipulation the contract related back to the time when the President took over the property."

Dakota Cent. Tel. Co. v. State of South Dakota, supra.

From the foregoing quotation, taken from a decision of this court considering the same documents which we invoke to sustain our contention, it would seem that the action of the Postmaster General has been by this court declared to be the action of the President, and that the action of the President is under and in conformity or, as we contend, of like force as if a part of the joint resolution.

As was said by District Judge Jack; in the District Court for the Southern District of Texas, in the case of Southwestern Telegraph and Telephone Company *v.* City of

Houston *et al.*, reported in 256 Federal Reporter, 690, on page 698:

"The President, acting through the Postmaster General, may or may not have made a good contract. The authority to enter into such a contract involved the exercise of his own judgment, and where such discretion is vested in the President, the courts have no authority to inquire whether or not he acted wisely or to the best advantage. They may not substitute their judgment for his.

"As was said by the Supreme Court as far back as Marbury *v.* Madison, 1 Cranch, 137; 2 L. Ed., 60:

"'By the Constitution of the United States, the President is vested with certain important political powers in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.'

"'In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive.'

"The court, in the same case, recognized the distinction in cases where the representative of the President acts in a matter requiring the exercise of discretion, and where his duties are purely ministerial:

"'The conclusion from this reasoning is that, where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where his specific duty is assigned by law, and individual rights depend upon performance of that duty,

it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.'

"The latest expression of the Supreme Court on the subject is in Louisiana *v.* McAdoo, 234 U. S., 633, 34 Sup. Ct., 941; 58 L. Ed., 1506, in which the court says:

" 'There is a class of cases which holds that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the acts. Such an act would be ministerial only. But if the matter with respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government. Marbury *v.* Madison, 1 Cranch, 137 (2 L. Ed., 60); Kendall *v.* United States, 12 Peters, 524, 610 (9 L. Ed., 1181); United States *v.* Schurz, 102 U. S., 378 (26 L. Ed., 167), are examples of instances where the duty was supposed to be ministerial. Cases upon the other side of the line are Decatur *v.* Paulding, 14 Peters, 497, 514, *et seq.* (10 L. Ed., 559, 609); Mississippi v. Johnson, 4 Wall., 475 (18 L. Ed., 437); Cunningham *v.* Macon, etc., Railroad, 109 U. S., 446 (3 Sup. Ct., 292, 609; 27 L. Ed., 992); United States *ex rel.* Dunlap *v.* Black, 128 U. S., 40 (9 Sup. Ct., 12; 32 L. Ed., 354); United States *ex rel. v.* Lamont, 155 U. S., 303 (15 Sup. Ct., 97; 39 L. Ed., 160); Roberts *v.* United States, 176 U. S., 221 (20 Sup. Ct., 376; 44 L. Ed., 443); Riverside Oil Company *v.* Hitchcock, 190 U. S., 316 (23 Sup. Ct., 698; 47 L. Ed., 1074); Ness *v.* Fisher, 223 U. S., 683 (32 Sup. Ct., 356; 56 L. Ed., 610)."

Therefore, upon the very excellent reason and authority before cited, we make bold to suggest to this court that the

contract and order of the Postmaster General be considered as if they were embodied in the presidential proclamation, and that the proclamation be read as if a part of and embodied in the joint resolution; and when we view the situation and read the documents from this point we cannot but feel that the 128-page brief of the petitioner is but a fine-spun web of meaningless legal verbosity, tautological and specious.

This court, in the Dakota Telephone rate case, *supra*, has said:

> "The President, * * * concluded a contract with * * * the companies of the most comprehensive character, covering the whole field."

The President, by General Order No. 1783 (folio 57) directed:

> "Until further notice, the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels" * * * "All officers, operators, and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment" * * * "No changes will be made until after the most careful consideration of all the facts."

Continuing operation in the *usual course*, by the same operatives, *without change*, comprehended the continuation of the right of the public to contract for the transmission and delivery of private messages as theretofore, with the rights as theretofore existing for breach of contract.

This court, in referring to the contract, by the use of the words "most comprehensive character, covering the whole field," has, in effect, so held, and it must follow from the very necessity of the thing, as well as from the relevant and pertinent provisions of the contract on this point, that such is the case.

As was said by District Judge Foster in the District Court for the Eastern District of Louisiana, at New Orleans, in the case of Witherspoon *v.* Postal Tel. Co., 257 Fed. Rep., 758, on page 759:

> "The proclamation directs that the supervision, possession, control, and operation of the telegraph and telephone systems shall be exercised by and through the Postmaster General, and that the said Postmaster General may perform his duties through the owners, managers, board of directors, receivers, officers, and employees of said telegraph and telephone systems. The proclamation further provides that the—
>
> "'Employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners or managers, as the case may be.'
>
> "Neither in the joint resolution nor the proclamation of the President is there a provision similar to section 10 of the act of March 21, 1918, c. 25, 40 Stat., 456 (Comp. St. 1918, §3115¾*j*), taking over the railroad systems of the country. It seems to me, however, that it was the intention of Congress, in authorizing the President to take over the lines, that the companies should go ahead with private business the same as theretofore. This would contemplate the institution and defense of suits. If the company is allowed to take and send private messages, there should be some method of holding it liable for damages occasioned through negligence, notwithstanding the Postmaster General had the direction and control of the company. See Postal Tel. & Cable Co. *v.* Call, Dist. Judge, 255 Fed., 859, — C. C. A., —.
>
> "The joint resolution provides for just compensation to the companies and the method of settling disputes as to same between them and the Government. If the companies are held for damages occasioned while under Government control, compensation will certainly extend to reimbursement."

We cite these pronouncements of the judges of the district courts, not as authority, but for the excellence of the reasoning therein set forth; and when we view their opinions in the light of the conditions then existing and of the four cardinal and primary documents upon which the rights of the public depend, we cannot but feel that they are wise, just, and in accordance with law.

Let us look for a moment at the conditions existing in July and August, 1918:

Our country was engaged in mortal combat with a powerful and unscrupulous enemy, whose system of espionage and sabotage was so well organized and so extensive that it was vitally necessary to the protection of the country and the winning of the war that the Government should supervise the means of rapid dispatch and transmission of intelligence, to censor the same and prevent them being put to unlawful and harmful use by enemies in our midst.

Government control was rendered necessary for the further reason that State secrets of the utmost importance were being flashed across the wire from official to official, and it was indispensably necessary that these secrets should remain inviolate, and there was no other means than Government supervision to positively insure this protection.

This supervision was made necessary in order to give preference to Government messages, any delay of which might have caused irreparable and untold damage, loss, and confusion.

And as the war was one of resources and wealth as well as one of men and munitions, the item of revenue to the Government from the operation was not a negligible consideration.

These, in brief, we apprehend, were the compelling motives to the passage of the joint resolution and the action of the Chief Executive in exerting the power conferred upon him, from the standpoint of the Government, considered as such. But there were other motives and ideas underlying and in-

extricably involved therewith, and among them may be mentioned the vital necessity of not only maintaining private and corporate enterprise, productivity, and commerce at its highest efficiency, but even of increasing the efficiency thereof by unifying and operating these basic and fundamental necessities of our complex industrialism as a national system as a means to winning the war.

We gather so much from the public documents on the subject and from the expression of learned judges, State and Federal, who have discussed the same in their printed opinions.

If, then, among other things, the Government was operating the wire systems for profit and with a view to increasing the efficiency thereof, in the usual course, through the same corporate entities, instrumentalities, and operatives, without change, it must needs follow that the all-embracing, comprehensive contract, covering the whole field, contemplated contracts for transmission and delivery of private messages, and necessarily compensation for damages caused by negligence. Any other conclusion, we deferentially submit, would impute to the Chief Executive a callous disregard for the rights of citizens which would be unjustifiable from any angle or from any public or private act of his and would be a reproach on the Government, which in its entire history has never, and we fondly hope and believe will never, assume such an attitude.

The contract itself, comprehensive and all-embracing, covering the whole field, as it does, proposed by the petitioner, accepted by the Government, and offered in evidence in this case, in so many words covers the point in controversy:

Among other things, this contract provides (section 8, paragraph E, folio 7):

> "The Postmaster General shall pay or save the owner harmless for all expense incident to or growing out of the possession, operation, and use of the property taken over during the period of Federal control.

He shall also pay or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines or penalties that may be imposed upon, it by reason of any cause of action arising out of Federal control or anything done or omitted in the possession, operation, use or control of its property during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General of the United States."

Paragraph 8, section F, folio 67:

"The Postmaster General shall save the owner harmless from any and all liability, loss, or expense resulting from or incident to any claim made against it, growing out of anything done or omitted during the period of Federal control, in connection with or incident to operations or existing contracts relating to operations, and shall do and perform, so far as is requisite, during the period of Federal control, for the protection of the owner, all and singular the things of which he may have notice, necessary and appropriate to prevent, because of Federal control or by reason of anything done or omitted thereunder, the forfeiture or loss by the owner of any of its property rights, ordinance rights or franches or of its connecting or other contracts involving a facility of operation."

There is nothing in the contract anywhere to modify this provision in the very least. The purpose, above adverted to, to obtain which the wire systems were taken over, the high regard manifested and oft repeated in the public documents on the subject for public and private rights and the whole tenor, true intent and meaning of this contract, containing the above-quoted provisions, is consistent therewith and shows that the parties thereto had in mind and intended to settle the things therein set forth and for which we contend here in this court.

The contract provides in terms that the Postmaster General shall pay or save the owner harmless from all judgments and

decrees recovered against it by reason of any cause of action arising out of Federal control, or any act done or omitted during Federal control.

There is no qualification to the term "judgments" or "decrees."

There is no one court or set of courts, State or Federal, designated or specified wherein these judgments or decrees which the Postmaster General is to pay or save the petitioner harmless from are to be recovered or issued.

There is no limitation or qualification as to the nature of the cause of action upon which the judgment may be recovered or decree issued, and, on the contrary, the terms are broad and all-inclusive—"anything done or omitted."

There is but one class of judgments and decrees excepted, and those are founded on obligations of the owner to the Postmaster General or the United States.

The words of the contract are broad, all-inclusive, clear, and unequivocal. They authorize suit by the plaintiff below or any other citizen in any court in the land, State or Federal, where the petitioner has an office for "any act done or omitted" during the period of Federal control.

This contract was proposed by the petitioner when it was already being operated by the Government, *in the usual course, without change*, and intended to be *most comprehensive, and to cover the whole field*, and it cannot now be heard to say that the plain, simple, untechnical, unambiguous words used therein, when read in the light of the proclamation of the President, do not mean what they say.

Let us suppose that the joint resolution of Congress had provided:

That the President do take over the wire systems of the country and operate the same during the period of the war through the existing corporate entities, instrumentalities, and operatives, in the usual course, without change, except as he may from time to time make by general or special order, and that the Government would pay and save harmless the wire

companies from all judgments and decrees rendered against them or any of them by reason of any cause of action arising out of anything done or omitted during the period of Federal control.

This court, we apprehend, would immediately say that thereunder the wire companies would suffer the action in the present case, defend it, and upon payment of the judgment the Government would be in honor and law bound to pay the same, with all reasonable expenses incurred in defending the same.

This much we contend has been done, but by an instrument which is not open to attack as being unconstitutional, a solemn contract, voluntarily entered into and proposed by the petitioner, and which the petitioner cannot be heard to say deprives it of its property without due process of law; nor can it say, we respectfully submit, that it denies it or the Government the equal protection of the law.

Suppose, if the court please, that the petitioner, having defended and lost this suit, should present the Government with a transcript of the record, a receipt for the judgment paid, and a bill of the expense, and the Government should refuse to pay; then, under the terms of the joint resolution and the contract, the petitioner could sue the Government and recover over, and there would be no uncertainty or chance of loss involved therein; for, as a Government instrumentality it was being operated; as a government instrumentality it was making a profit for the Government; as a Government instrumentality it was sued; as a Government instrumentality it paid, and as a Government instrumentality it would be entitled to just compensation under the joint resolution and contract.

The Government has the right to appoint a representative to defend for it and to pay judgments rendered against its representative. So much it did in the case of the railroads. If the Government could appoint Mr. McAdoo to defend

suits and pay judgments for it by congressional and presidential action, why cannot the same Government, by congressional and presidential action, by and with the agreement and consent of the petitioner, as evidenced and expressed in its solemn contract, make and appoint the petitioner its representative for the same purpose? And is not this exactly what has been done?

The contention of the petitioner, when stripped of its surplusage, is merely a denial of this statement and an attempt to give to the plain, simple words used another meaning.

The petitioner cannot deny that the joint resolution left it entirely to the President to determine just compensation. It cannot deny that the President, in taking it over, directed it to continue in business as usual and without change; it cannot deny that it entered into a contract of the most comprehensive character, covering the whole field, designed to carry out the President's determination of just compensation for its operation as usual and without change; it cannot deny that a large part of its business and expense consisted of defending suits and paying judgments of this character; it cannot deny that the Government agreed to pay such expense and judgments as a part of the scheme of just compensation, and therefore it seeks to conceal its real contention in a voluminous verbose and tautological argument, fortified by a multiplicity of judicial decisions without a weight of analogy.

The petitioner could certainly sue the Government for clerk hire paid by it during the period of Federal control under the contract. Is that more an item of legitimate expense than the expense of this suit and the payment of this judgment?

The petitioner could certainly sue the Government for any claim it had adjusted for damages during the period of Federal control. Is that more an item of legitimate expense

than the defense of this suit and the payment of this judgment?

Assuming that the court will accept the proposition advanced by the respondent, that the contract for compensation is of the same legal efficacy as if its terms were embodied in the joint resolution, then it may be contended that it is unconstitutional, in that it denies to and deprives the Government of its right to defend suits which are in reality against it, but in form against the petitioner. If the contract were embodied in the joint resolution and it were attacked as being unconstitutional, we submit its terms would defeat the attack, because judgments for damages for unlawful acts would be an item of operating expense as necessarily incident to operation as clerk hire or line maintenance, and if the Government authorized the suit and agreed to repay the petitioner sums paid out by it therefor, and in pursuance thereof the petitioner paid and the Government refused to repay, at the suit of the petitioner the Government could not deny its liability over. The Government could not make the law, act under the law, accept the benefits, and disclaim its liability for its burdens by asserting (1) that it was denied the equal protection of the law, (2) that its property was taken without due process of law, or (3) that *private* property was being taken without compensation. However, the fact is the Government makes no such contention. It is not the Government, but the petitioner, before the court, and it suggests:

(1) There could be no liability against the petitioner unless imposed by the joint resolution and the presidential proclamation.

(2) That neither the joint resolution nor the proclamation impose any such liability.

(3) That the United States is the real party in interest and could not be sued in the State court, as it had not con-

sented thereto, and could be sued in no other place than a district court or the Court of Claims.

(4) That if the joint resolution had made it liable and suable for acts done and omitted during Federal control, it would deprive the petitioner of its property without due process of law.

(5) That the joint resolution, not having imposed liability upon petitioner, the judgment of the State court authorizes the taking of private property without due process of law and denies it the equal protection of the law.

We will discuss its suggestions in the order stated:

1. We do not admit the correctness of this contention, but if it be accepted as sound, then it is rebutted by what we have already said, to the effect that the contract between the petitioner is of equal and even greater strength than if embodied in the joint resolution, and stands upon the same footing in the law as a consent decree or a legislative enactment upon the request of the parties affected.

2. Although the joint resolution does not in terms, on its face, impose any such liability or suability, it leaves it to the President to make just compensation, and he, through his Postmaster General, and the petitioner have stipulated in writing for the payment of judgments so entered against the petitioner, the same as for clerk hire, line maintenance, or any other item of operating expense.

3. The United States is not the real party in interest. It has surrendered its right to so claim by contract authorized by act of Congress, and under and by the same authority and in the same contract it has consented to pay judgments rendered against the petitioner in any court, not having designated or specified any certain or particular court; or, to state it differently, it has consented to be sued in the State courts, if you please, in the name of the petitioner and to pay the judgments rendered therein.

4. The petitioner cannot contend that it is deprived of its property without due process of law if it has to pay this judgment by suggesting that the Government *might* breach its solemn contract, entered into under the authority of an act of Congress; or by suggesting that if the contract had been embodied in the joint resolution, it would have been violative of the Constitution, for while acts of Congress are sometimes declared unconstitutional, not yet have we seen a contract entered into in due form of law, by competent parties, in respect to a lawful subject-matter, declared unconstitutional, and to this extent we submit that the contract is higher and affords more complete protection to the petitioner than if embodied in the joint resolution, and not only binds and precludes the Government, but effectually estops the petitioner.

5. The right of the State court to enforce and protect the rights of its citizens against the petitioner under a contract with the Government authorized by an act of Congress does not take private property without due process of law, nor does it deny to petitioner the equal protection of the law. The burden of the petitioner's argument is this:

If it has to pay this judgment and the Government refused under the contract to repay it, petitioner would then have to produce the respondent and his witnesses and prove its case against the Government in order to enforce payment. The fallacy of this argument is readily apparent by reference to the terms of the contract. If the Government, in breach of the contract, should refuse to repay petitioner the amount expended by it in settlement of this judgment, it could sue the Government, under the joint resolution, upon the contract, and the introduction in evidence of the record of this case would entitle the petitioner to a verdict by direction. If this is true it must be manifest that the suggestions and contentions of petitioner are wholly without merit. The test of the verity of this assertion rests upon the authority of the

President, through his Postmaster General, to make the contract. We think that this authority is abundantly conferred by the joint resolution.

The rate cases decided by this court and many State courts are not inconsistent, but are in harmony with the contention of the respondent. This line of cases but affirms the validity of the joint resolution, proclamation, and contract. They are based upon the reason that if the United States has power to take over the wire systems, it has the exclusive power to regulate the rates and tolls from which to make the compensation and a profit to help win the war. An interference with the Government in establishing new rates to meet the changed conditions would have been tantamount to a declaration that the Government did not have the power to take over and control. These suits were for injunction to restrain a Government official from the performance of a public duty and were necessarily denied for both reasons.

The numerous State and Federal decisions denying citizens the right to sue a wire company for damages, so far as the reported decisions show, were pronounced without consideration of the contract, and especially the provisions above quoted.

It is very evident that the learned discussion which took place in the United States Senate was due to ignorance on the part of the distinguished Senators as to the existence of the contract and its provisions. There are probably many suits now pending of a similar nature.

The justice, the reason, and the necessities of the thing, we submit with all deference, require a decision at the hands of this court affirming the judgment of the Supreme Court of South Carolina.

Respectfully submitted,

PHILIP H. ARROWSMITH,
ALVA M. LUMPKIN,
Attorneys for Respondent.

WESTERN UNION TELEGRAPH COMPANY *v.* POSTON.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 293. Argued October 29, 1920.—Decided June 6, 1921.

1. A telegraph company is not subject to a common-law liability for negligent delay in the delivery of a message while its system was in the exclusive possession and control of the Government and being operated by the Postmaster General, pursuant to the Joint Resolution of July 16, 1918, c. 154, 40 Stat. 904, and the Proclamation of July 22, 1918, 40 Stat. 1807. P. 664. *Missouri Pacific R. R. Co.* v. *Ault*, *ante*, 554.
2. The provision of the proclamation for continuing operation of the telegraph systems through their officers and employees in the names of their respective companies, subject to the orders of the Postmaster General, did not make the companies the operating agents of the United States, and so render them liable for such negligence, nor did the Postmaster General's Order, of like effect, dated August 1, 1918. P. 665.
3. The contract of October 9, 1918, between the Postmaster General and the petitioner did not make the company liable for negligence under government operation, but merely provided indemnity. P. 666.
4. Omission of Congress to provide a remedy against the Government in such cases would afford no ground for holding the telegraph company liable. P. 667.

107 S. E. Rep. 516, reversed.

THE case is stated in the opinion.

Mr. Rush Taggart and *Mr. Francis R. Stark*, with whom *Mr. P. A. Willcox*, *Mr. F. L. Willcox* and *Mr. Henry E. Davis* were on the brief, for petitioner.

Mr. Philip H. Arrowsmith, with whom *Mr. Alva M. Lumpkin* was on the brief, for respondent.

The Solicitor General filed a brief on behalf of the United States.

Mr. Wm. M. Silverman and *Mr. Joseph P. Tolins*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Supreme Court of South Carolina (107 S. E. Rep. 516) affirmed a judgment of the trial court against the Western Union Telegraph Company for damages resulting from negligent delay in delivering an intrastate message sent October 2, 1918. Its telegraph system was at that time in the exclusive possession and control of the Government and was being operated by the Postmaster General pursuant to the joint resolution of Congress of July 16, 1918, c. 154, 40 Stat. 904, and the proclamation of the President of July 22, 1918, 40 Stat. 1807. The state court declared that, while the action and the judgment recovered therein were in form against the Western Union Telegraph Company, yet, in effect, they were against the Postmaster General; that in suing the company the plaintiff had pursued the course directed by the President's proclamation and confirmed by the contract dated October 9, 1918, between the Postmaster General and company concerning compensation; and that since under this contract the Postmaster General would have to pay any judgment rendered against the company, the entry of judgment would not deprive it of property without due process of law. This court granted a writ of certiorari; 253 U. S. 480. Whether the company can be held liable is the only question presented here.

Our decision must depend primarily upon the authority conferred by Congress in the joint resolution which provided:

"That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war . . . *Provided*, That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President."

Under this resolution the President might, doubtless, have limited his function to mere supervision of the telegraph and telephone systems leaving them in the possession and under the control of the companies. But the resolution also empowered him "to take possession and assume control " of the systems; and this he did, (*Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 183, 185) the proclamation declaring:

"I . . . do hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies. . . .

"From and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice."

In conferring upon the President power "to take possession and assume control " of the telegraph systems the resolution adopted language identical with that which had been employed in the Act of August 29, 1916, c. 418, 39 Stat. 619, 645, pursuant to which the railroads were brought under federal control. See *Missouri Pacific R. R.*

Co. v. *Ault, ante,* 554. We held there that the supplementary legislation known as the Federal Control Act did not impose liability upon the company, and that, since the Government was operating the property, the railroad company could not be held liable under the established principles of the common law governing liability. These principles are equally applicable here.

In respect to telegraph systems there was no supplementary legislation similar to the Federal Control Act; so that the argument mainly relied upon by plaintiff in the *Missouri Pacific Case* is not made here. But it is contended that the proclamation, the order of the Postmaster General of August 1, 1918, and the contract between him and the company concerning compensation authorized suit against the company as the operating agent of the Government in the same way that the Federal Control Act authorized suit against the Director General. We find in them no basis for such liability.[1] Obviously neither proclamation, order, nor contract could create a liability not authorized by the resolution of Congress on which they rest. Nor did they attempt to do so.

(a) The provision in the proclamation relied upon to establish the liability is this:

"Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers, and employees of the various telegraph

[1] This view has been taken also by state courts. *Canidate* v. *Western Union Telegraph Co.*, 203 Ala. 675; *Western Union Telegraph Co.* v. *Glover*, 17 Ala. App. 374; *Western Union Telegraph Co.* v. *Davis*, 142 Ark. 304; *Mitchell* v. *Cumberland Telephone Co.*, 188 Ky. 263; *Foster* v. *Western Union Telegraph Co.*, 205 Mo. App. 1; *Western Union Telegraph Co.* v. *Conditt*, 223 S. W. Rep. 234 (Tex. Civ. App.); *Western Union Telegraph Co.* v. *Robinson*, 225 S. W. Rep. 877 (Texas Civ. App.). See contra, *Witherspoon & Sons* v. *Postal Telegraph & Cable Co.*, 257 Fed. Rep. 758; *Spring* v. *American Telegraph & Telephone Co.*, 86 W. Va. 192.

and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be."

This provision is in no way inconsistent with holding that the President took possession of and operated the telegraph systems as distinguished from taking over the companies and operating them. The companies were not made the operating agents of the United States. The officers of the companies were to operate the properties for the United States and it was to be done "in the names of their respective companies."

(b) The Postmaster General's Order No. 1783, dated August 1, 1918, was of like effect. It merely directed that:

"Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. . . . All officers, operators and employees . . . will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment."

(c) The contract of October 9, 1918, between the Postmaster General and the Western Union, did not purport to make the company liable. It merely provided indemnity. The provision relied upon is this:

"The Postmaster General shall pay, or save the owner harmless from, all expenses incident to or growing out of the possession, operation and use of the property taken over during the period of Federal control. He shall also pay or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of Federal control or anything done or omitted in the possession, operation, use or control of its property during the period of Federal

control, except judgments or decrees founded on obligations of the owner to the Postmaster General or the United States."

This provision is substantially the same as that inserted in the compensation agreement entered into between the Director General of Railroads and the railroad companies.[1]

It is urged that telegraph companies should be held liable because otherwise those using the system would be without remedy for losses suffered thereby. Whether this is true or whether under the Tucker Act the sender of a message would have a remedy in the Court of Claims or in a Federal District Court we have no occasion to consider in this case.[2] If Congress has omitted to provide adequately for the protection of rights of the public, Congress alone can provide the remedy.

Reversed.

---

[1] See Form A, October 22, 1918, for "Agreement between the Director General of Railroads and the . . . Company," Bulletin No. 4 (Revised) pp. 39, 47, § 4, Par. *i*.

[2] In *Heil* v. *United States*, 273 Fed. Rep. 729, a petition under the Tucker Act for damages arising from failure to transmit a prepaid cable message over the Commercial Cable Company's lines was held by Learned Hand, D. J., on demurrer to state a good cause of action. See also discussion in Senate, June 10, 1919, vol. 58, Cong. Rec., p. 920.